

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

No. **77-1458**

MAPCO INC. AND THOMAS A. MANHART,

Petitioners.

v.

JIMMY CARTER, PRESIDENT,
JAMES G. SCHLESINGER, SECRETARY OF ENERGY,
AND THE DEPARTMENT OF ENERGY,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY COURT
OF APPEALS OF THE UNITED STATES**

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**PETITION FOR A WRIT OF CERTIORARI
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Petitioners MAPCO Inc. and Thomas A. Manhart pray that a Writ of Certiorari issue to review the judgment and opinion of the Temporary Emergency Court of Appeals of the United States entered in this action on March 14, 1978.

OPINION BELOW

The Order of the District Court certifying constitutional issues to the Temporary Emergency Court of Appeals has not been reported, either officially or unofficially. The opinion of the Temporary Emergency Court of Appeals has not yet been officially reported, but has been unofficially reported at 4 CCH Energy Mgmt., ¶ 26,096. Copies of the Order of the District Court, and of the judgment and opinion of the Temporary Emergency Court of Appeals are reproduced in the Appendix. (App. pages A-1 to A-3, A-4, and A-5 to A-37, respectively).

JURISDICTION

The District Court's certification order was entered on September 13, 1977. The judgment of the Temporary Emergency Court of Appeals ("TECA") was entered on March 14, 1978. No petition for rehearing has been filed. The jurisdiction of this Court is invoked pursuant to 12 U.S.C. App. 1904, §211(g), 15 U.S.C. §754(a)(1), and 42 U.S.C. §7192.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

1. Whether the crude oil price rollback mandated by 15 U.S.C. §757 is unconstitutional because it fails to provide a non-confiscatory standard for price regulation.
2. Whether the crude oil price rollback mandated by 15 U.S.C. §757 violates the ninth amendment right to trust the federal government and rely on the integrity of its pronouncements.

CONSTITUTIONAL AND STATUTORY PROVISIONS

FIFTH AMENDMENT, UNITED STATES CONSTITUTION

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

NINTH AMENDMENT, UNITED STATES CONSTITUTION

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

§401(a) OF THE ENERGY POLICY AND CONSERVATION ACT 15 U.S.C. §757(a)

"Not later than the first day of the second full calendar month following December 22, 1975, the President shall promulgate and make effective an amendment to the regulation under section 753(a) of this title which regulation, as amended, shall establish ceiling prices (or the manner of determining ceiling

prices) applicable to any first sale of crude oil produced in the United States, such that the resulting actual weighted average first sale price for all such crude oil during such calendar month and each of the 39 months thereafter shall not exceed a maximum of \$7.66 per barrel (hereinafter in this section referred to as the 'maximum weighted average first sale price') except as may be adjusted pursuant to this section."

10 C.F.R. §211.63 (41 F.R. 24388, June 16, 1976)

"(a) Scope. This section provides for the allocation of crude oil produced in the United States other than crude oil which is the subject of (1) purchases and sales made to comply with §221.65 of this subpart; (2) sales of crude oil made pursuant to Parts 225 and 225a, Chapter II of Title 30 of the Code of Federal Regulations; (3) the first sale of crude oil under 10 U.S.C. §7430(b), as amended by §201 of the Naval Petroleum Reserves Production Act of 1976; and (4) the first sale of any domestic crude oil produced and sold from a property from which domestic crude oil was not produced and sold prior to January 1, 1976."

"(b) General rule. (1) All supplier/purchaser relationships in effect under contracts for sales, purchases and exchanges of domestic crude oil on January 1, 1976 shall remain in effect for the duration of this program; *provided, however,* that any such supplier/purchaser relationship to which this section is

applicable may be terminated as provided in paragraph (d) of this section."¹

"(2) Once any first sale, purchase or exchange of domestic crude oil is made which is exempt from this rule pursuant to paragraph (a)(4) of this section, or once the sale, purchase or exchange of any domestic crude oil that has at any time been the subject of a supplier/purchaser relationship under subparagraph (1) of this paragraph (b) is made in accordance with this section to a firm that was not the purchaser thereof on January 1, 1976, or has not continued to purchase that crude oil without interruption since December 31, 1975, a supplier/purchaser relationship between the seller and purchaser shall be established thereafter under this section as though it had been in effect on January 1, 1976."

"(3) The provisions of this paragraph (b) shall not (i) operate to invalidate any supplier/purchaser relationship in effect on January 1, 1976 where the purchaser of the domestic crude oil involved was not the lawful purchaser thereof under the provisions of this section as in effect at any time prior to February 12, 1976, or (ii) impair any purchaser's rights under this section as in effect prior to February 12, 1976, including a purchaser's right to continue to receive the volumes of domestic crude oil flowing to it on

¹Paragraph d's methods are severely limited. One requires approval of the termination by the buyer; another only applies if the buyer refuses to meet a lawful higher price proposed by a prospective purchaser; another only applies to stripper well leases. The final provision allows substitution of purchasers if the old purchaser and prospective purchasers are resellers and rigid conditions are fulfilled.

December 1, 1973 or such later date at which its supplier/purchaser relationship was established under this section as in effect prior to February 12, 1976."

STATEMENT

A. STATEMENT OF THE CASE

1. This action was filed by petitioner MAPCO Inc. against Gerald R. Ford (then President of the United States), the Federal Energy Administration, and Frank G. Zarb (then Administrator of the Federal Energy Administration) in the United States District Court for the Northern District of Oklahoma on December 22, 1975.

2. The District Court had jurisdiction of this action pursuant to 28 U.S.C. §1331, 12 U.S.C. App. 1904, §211(a), and 15 U.S.C. §754(a)(1).

3. In the action, MAPCO Inc. seeks to enjoin the respondents from implementing and enforcing the crude oil price rollback mandated by Section 401(a) of the Energy Policy and Conservation Act of 1975 ("Energy Act"), P.L. 94-163, 89 Stat. 871, 42 U.S.C. §6201 *et seq.*, 15 U.S.C. §751 *et seq.* Section 401(a) adds a new Section 8(a) to the Emergency Petroleum Allocation Act of 1973 ("Allocation Act"), P.L. 93-159, 87 Stat. 628, 15 U.S.C. §751 *et seq.*

4. MAPCO Inc. is a Delaware corporation, with its principal place of business in the Northern District of Oklahoma, engaged in the business of producing and selling crude oil to refineries and other purchasers in the States of Oklahoma, Utah, Kansas and Wyoming.

5. On March 2, 1976, Thomas A. Manhart ("Manhart") filed a motion to intervene as a party plaintiff. Mr. Manhart is a citizen of Oklahoma, residing in the Northern District of Oklahoma, and engaged in the business of exploring for and developing reserves of crude oil, extracting and marketing such crude oil to refineries and other purchasers in Oklahoma and other parts of the United States. On March 17, 1976, the District Court granted Manhart's motion to intervene.

6. On May 10, 1976, the respondents filed a motion for dismissal or, in the alternative, for summary judgment. On June 2, 1976, the petitioners filed a motion for summary judgment.

7. On September 13, 1977, before the determination of any of the pending motions, the District Court, pursuant to 12 U.S.C. App. 1904, §211(c), and 15 U.S.C. §754(a)(i), entered its order certifying the constitutional questions to TECA. In its order, the District Court substituted Jimmy Carter for Gerald R. Ford, and John F. O'Leary for Frank G. Zarb. Rule 25(d), F.R.C.P.

8. On March 14, 1978, TECA entered its opinion and judgment, granting the respondents judgment on the constitutional issues. In its opinion, TECA substituted the Department of Energy for the Federal Energy Administration and James G. Schlesinger for Frank G. Zarb. DOE Act, P.L. 95-91, 91 Stat. 565, 42 U.S.C. §1701 *et seq.*, Executive Order 12009 (42 F.R. 46267, September 15, 1977); Rule 43(c), F.R.A.P.

9. TECA had jurisdiction of the certification by the District Court, pursuant to 12 U.S.C. App. 1904, §211(c), made applicable to this appeal by 15 U.S.C. §754(a)(i) and 42 U.S.C. §7192.

10. In its opinion, TECA held:

- (a) That the crude oil price rollback mandated by 15 U.S.C. §757 was constitutional because it was only a *temporary* regulation of *selected areas* of the crude oil industry; and
- (b) That the people have no right to trust the federal government or rely on the integrity of its pronouncements.

B. STATEMENT OF THE FACTS

Prior to August, 1971, the petitioners marketed crude oil as produced on the basis of prices from time to time offered by purchasers in the petitioners' various areas of operation.² Subsequent to August, 1971, the petitioners, in common with domestic crude oil producers generally, have been subjected to a continuing and increasingly pervasive scheme of price and marketing regulation.

The Energy Act represents the culmination of a process whereby this pervasive regulatory scheme has been focused selectively on the crude oil production industry and has assumed a permanent character. The major steps in this process are set out below:

- (a) Price regulation of the petroleum industry began in August, 1971, when the President of the United States imposed a temporary ninety-day freeze under the Economic Stabilization Act ("Stabilization Act"), which authorized the President or his delegate to "stabilize prices, rents, wages, and salaries." 12 U.S.C. App. §1904.
- (b) For the next two years the crude oil industry was

²Affidavit of Robert E. Thomas, R. 130; Affidavit of Thomas A. Manhart, R. 132.

subject to price controls administered by the Cost of Living Council ("COLC"), created by Executive Order No. 11615 (36 F.R. 20139, August 15, 1971), during which several "phases" of wage and price regulation, each purporting to be temporary, were successively established.

(c) Although economic controls were gradually withdrawn from other industries, specific controls on crude petroleum and petroleum product prices were continued.

(d) On January 12, 1973, the President of the United States delegated his powers under the Stabilization Act to the chairman of the COLC, thereby authorizing him to "take the actions required or permitted by the Act." Executive Order No. 11695 (38 F.R. 1473, January 12, 1973), continued in effect by Executive Order No. 11730 (38 F.R. 19345, July 19, 1973).

(e) In August, 1973, the COLC undertook to devise a new system of price controls for the crude oil industry. The result was a two-tier pricing system for crude oil which was set forth in COLC regulations promulgated in that month and which, although purporting to be temporary, has survived in varying forms until the present time.

(f) On November 27, 1973, another purportedly temporary measure, the Allocation Act, became law. Among other things, it directed the President to promulgate regulations for the mandatory allocation of crude oil in amounts and at prices to be established by such regulations.

(g) On December 4, 1973, the President established the Federal Energy Office ("FEO") and delegated to it all authority vested in him under the Allocation Act and the Stabilization Act as it related to the production,

conservation, use, control, distribution and allocation of energy. Executive Order No. 11748 (38 F.R. 33575, December 4, 1973).

(h) On December 26, 1973, and January 30, 1974, the COLC purported to delegate to the FEO the COLC's pricing authority under the Stabilization Act insofar as it related to energy. COLC Order No. 47 and Amendment I thereto.

(i) Pursuant to its authority under the Allocation Act, the FEO issued final Mandatory Petroleum Allocation Regulations on January 15, 1974, which preserved COLC's two-tier crude oil pricing system.

(j) On May 7, 1974, the Federal Energy Administration Act of 1974, 15 U.S.C. §761 *et seq.* became law and by Executive Order No. 11790 (39 F.R. 23185) on June 27, 1974, the FEA was established to succeed FEO, at which time FEA continued administration of the crude oil pricing and allocation provisions of the Allocation Act, preserving the two-tier pricing system established by its predecessors.

(k) The Allocation Act was "temporary" and "emergency" legislation and was, by its terms, to expire on February 28, 1975. This expiration date was then extended to August 31, 1975. P.L. 93-511. This new expiration date was extended to November 15, 1975, "to provide Congress and the Executive adequate time and opportunity to reach mutual agreement on a *long-term petroleum pricing policy*". P.L. 94-99. [Emphasis added]. On November 12, 1975, the expiration date was again extended to December 31, 1975, the purpose of the latter extension being to prevent the gap in price and allocation control which would have

occurred if the Allocation Act had expired before enactment of the Energy Act. P.L. 94-133.

(1) Congress and the Executive reached agreement on a *long-term petroleum pricing policy* in the Energy Act which became law on December 22, 1975. Section 401(a) of the Energy Act effected substantial amendments to the Allocation Act and mandated amendments to the regulations thereunder.

(1) Among other things, the President was directed to revise the regulations previously promulgated under §4(a) [15 U.S.C. §753(a)] of the Allocation Act in such a manner as to abrogate the two-tier system and roll back free market prices for new and released oil. This was to be accomplished by establishing ceiling prices applicable to any first sale of crude oil produced in the United States so that the resulting actual weighted average first sale price for all crude oil during February 1976 and each of the thirty-nine months thereafter shall not exceed a maximum of \$7.66 per barrel, subject to adjustment within the limitations narrowly prescribed by the statute.

(2) Although the President may provide different ceiling prices for different categories of domestic crude oil, his flexibility is severely circumscribed inasmuch as the specified maximum weighted average first sale price may not be exceeded.

(3) In establishing pricing classifications for crude oil within the confines of the maximum weighted average first sale price, the only statutory standards by which the President is to be guided are that such

classifications be "administratively feasible" and "consistent" with obtaining optimum production of crude oil in the United States.

(4) Section 461 of the Energy Act added a new Section 18 to the Allocation Act, 15 U.S.C. §760(g), the effect of which was to extend the scheme of price and allocation regulation, as modified, for a period of three years and four months. Thereafter, the President's authority to perpetuate the scheme becomes "discretionary" until September 30, 1981, a date which will roughly mark the tenth anniversary of price controls in the crude oil industry.

(m) The Energy Conservation and Production Act, ("Production Act"), P.L. 94-385, 90 Stat. 1125, 42 U.S.C. §6801, *et seq.*, was enacted on August 14, 1976. The Production Act effects certain changes in the regulatory scheme established by the Allocation Act.

(1) The Production Act extended the FEA until December 31, 1977.

(2) The Production Act exempts "stripper well crude oil" from oil price controls.

(3) The Production Act removes the annual 3% limitation on an adjustment in the composite price available as an incentive to increase domestic production of crude oil. Now, the incentive adjustment is controlled by the general 10% limitation per year stated in the Energy Act.

(n) The DOE Act, P.L. 95-91, 91 Stat. 565, 42 U.S.C. §7101 *et seq.*, was enacted on August 4, 1977. The DOE Act transferred the functions of the FEA to the Department of Energy, which then became a permanent cabinet-level department of the Executive Branch. The stated purpose of the DOE Act was "to secure effective management to assure a coordinated national energy policy."

The fundamental and announced purpose of the two-tier crude oil price system was to induce investment in domestic exploration as well as the investment in the development and use of high-cost enhanced recovery methods for depleted or marginal wells. Consistent with the intent of those who devised it, the two-tier crude oil price system operated as an intricate administrative mechanism which—through the favored treatment of new oil coupled with the released oil device—sought to induce and did induce the petitioners and others to invest large sums of capital in exploration for new reserves and in secondary recovery of existing reserves.³

The means of inducement was the prospect of world market prices for the favored categories of new and released oil, a prospect which has now been destroyed by the Energy Act. At the time of promulgation of the two-tier crude oil price system, the government represented that the purpose of the two-tier crude oil price system was to provide an incentive to induce investment in domestic exploration and investment in the development and

³Defendants' Responses to Plaintiffs' Second Written Interrogatories, Response to Interrogatory No. 2, (R. 111), Response to Interrogatory No. 8, (R. 112), Response to Interrogatory No. 14, (R. 113), Response to Interrogatory No. 35, (R. 120), Response to Interrogatory No. 36, (R. 120), and Response to Interrogatory No. 37, (R. 120, 121). ("It is admitted that the fundamental purpose of permitting 'new' crude oil...to be sold without regard to a ceiling price was to provide incentives for increased crude oil production...") (R. 111).

use of high-cost enhanced recovery methods for depleted or marginal wells.⁴

In reliance on the two-tier crude oil price system and the representations of the respondents as to the purpose of adoption of the two-tier crude oil price system, and in reliance on expressed exhortations of the respondents addressed to the petitioners and to other crude oil producers, calling upon them to increase their drilling and development activities, the petitioner MAPCO, from August, 1973, to December 22, 1975, expended in excess of \$43,800,000.00 directly attributable to the exploration for and development of reserves of crude oil, and the petitioner Manhart expended \$28,000.00.⁵

REASONS FOR GRANTING THE WRIT

1. The Fifth Amendment. This court should grant certiorari because the TECA decision raises fundamental questions of constitutional law relating to the fifth amendment. In particular, this Court should grant certiorari for the following reasons:

(a) TECA has repudiated direct holdings of the United States Supreme Court and has decided fifth amendment issues in conflict with prior decisions of the United States Supreme Court. Rule 19, Supreme Court Rules, 28 U.S.C. App.; *Wilson v. Schnettler*, 365 U.S. 381 (1961).

(b) TECA has obliterated the constitutional distinction between temporary and permanent legislation. TECA's treatment of this constitutional doctrine presents a

⁴*Id.*

⁵Affidavit of Robert E. Thomas, R. 130; Affidavit of Thomas A. Manhart, R. 132.

fundamental concern of continuing importance. *Cf., Yellin v. United States*, 374 U.S. 109 (1963).

(c) The character and structure of the Congressional oil-pricing regulatory scheme is unique and unprecedented. The scheme involves, for the first time in our history, direct Congressional rate-making and no statutory provision for just and reasonable rates.

(d) This Court has never ruled on the constitutionality of the Congressional oil-pricing regulatory scheme.

(e) TECA has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 19, Supreme Court Rules, 28 U.S.C. App.

Each of these reasons is hereinafter discussed:

(a) *TECA has repudiated direct holdings of the United States Supreme Court and has decided fifth amendment issues in conflict with prior decisions of the United States Supreme Court.* The fifth amendment to the Constitution provides, in relevant part, that "[n]o person shall...be deprived of...property, without due process of law; nor shall private property be taken for public use, without just compensation." In measuring regulatory legislation against the fifth amendment, the critical inquiry is whether the statute in question effects or authorizes a "taking" within the meaning of the amendment. Whether a taking occurs depends not upon the characteristics of the regulated entity, but instead upon the *nature and duration* of the regulatory scheme. Constitutional limitations on the taking of property become operative when the regulatory framework constitutes a long-term and pervasive scheme of market regulation supplanting market forces. Decisions of the Supreme

Court require that any rate established be within the "zone of reasonableness", which cannot be "confiscatory in the constitutional sense." *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942); *Federal Power Commission v. Hope*, 320 U.S. 591 (1944). See generally, F. X. Welch, *Principles of Public Utility Regulation* (1969).

The Supreme Court has expressly extended the constitutional protection of the fifth amendment to industries other than public utilities, where the government subjects the industry to comprehensive market regulation. *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

The Permian Basin Area Rate Cases expressly recognize that the extension of a scheme of comprehensive market regulation to producers of wellhead gas, a non-public utility function, could be justified only because the regulatory scheme provided a mandatory standard for the determination of non-confiscatory prices. The Natural Gas Act of 1938 provides, in relevant part, that "[a]ll rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the [Federal Power] Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful."⁶ The Federal Power Commission ("FPC") is empowered to establish a just and reasonable rate and abandonment of facilities requires the prior approval of the FPC.⁷

The "just and reasonable" standard for ratemaking prescribed by Section 4(a) and 5(a) of the Natural Gas Act is

*15 U.S.C. §717c(a) [emphasis added].

⁷15 U.S.C. §717d and f.

precisely coterminous with federal constitutional requirements.⁸ The observation that the statutory "just and reasonable" standard of the Natural Gas Act equates with the constitutional requirement was reiterated in 1968 by the Supreme Court in the *Permian Basin Area Rate Cases*. In responding to the argument that it was unconstitutional for the FPC to set prices on an area rather than on an individual producer basis, and after observing that the gas producers were not public utilities, the Supreme Court stated:

"... It is, however, plain that the 'power to regulate is not a power to destroy', [citation omitted] and that maximum rates must be calculated for a regulated class in conformity with the pertinent constitutional limitations." *Id.* 390 U.S. at 769-70.⁹

Thus, in the *Permian Basin Area Rate Cases*, the Supreme Court expressly recognized that the establishment of a scheme of comprehensive market regulation is a taking which requires the establishment of a constitutionally non-confiscatory standard of price control. See also, *Federal Power Commission v. Hope*, 320 U.S. 591 (1944).

In its Opinion, TECA has ignored this well-settled doctrine. TECA simply asserts, without justification, that regulation of the oil industry is neither comprehensive nor permanent, and the decisions of this Court do not apply. The TECA decision is absurd, as hereafter discussed.

⁸*Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942).

⁹Over a half-century ago, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922), Mr. Justice Holmes warned: "... [w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

(b) TECA has obliterated the constitutional distinction between temporary legislation and permanent legislation. It is well-established, both by the opinions of this Court¹⁰ and by the prior opinions of TECA,¹¹ that "a limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." *Block v. Hirsch*, 256 U.S. at 157. Where Congress has enacted temporary legislation to meet an emergency situation, the standard of scrutiny is far less than in those situations which are chronic and long term, in response to which Congress passes a permanent statutory measure. Despite TECA's recognition in prior cases of the distinction between temporary and permanent legislation, TECA has in the present decision obliterated the distinction:

"In this connection, we note that no law made by humans is 'permanent'. At the most, duration is indefinite and subject to change." (App. p. A-33).

Permanence in the constitutional sense is, however, a long-continuing response to a chronic problem. *See Condor Operating Co. v. Sawhill*, 514 F.2d 351 (TECA 1975), cert. denied, 421 U.S. 976 (1975); *Cities Service Gas Co. v. FEA*, 529 F.2d 1016 (TECA 1975).

Comprehensive regulation of price and customer relationships has been imposed on the crude oil industry since August, 1971, when the President imposed a price freeze, then

¹⁰ *Block v. Hirsch*, 256 U.S. 135 (1921); *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398 (1934).

¹¹ *Condor Operating Co. v. Sawhill*, 514 F.2d 351 (TECA 1975); *Pasco v. FEA*, 525 F.2d 1391 (TECA 1975), cert. denied, 421 U.S. 976 (1975); *Cities Service Gas Co. v. FEA*, 529 F.2d 1016 (TECA 1975); *Gulf Oil Corp. v. Simon*, 502 F.2d 1150 (TECA 1974).

justified as temporary, under the authority of the Stabilization Act. For the next two years, the industry was subject to price controls administered by the Cost of Living Council. In December, 1973, this pervasive regulation was taken over by the FEO. In May, 1974, the FEA was created and assumed the responsibilities of the FOE.

The Allocation Act was a temporary measure and, by its terms, was to expire on February 28, 1975. This expiration date was extended in stages to November 15, 1975, for the express purpose of providing "Congress and the Executive adequate time and opportunity to reach mutual agreement on a long-term petroleum pricing policy." P.L. 94-99. The Allocation Act was again extended to December 31, 1975, the purpose being to "prevent an hiatus in price control authority which would occur if the Allocation Act were allowed to expire before enactment of the [Energy Act]." Congressional Record, S. 20090 (November 14, 1975) (Remarks of Sen. Jackson). The crude oil-pricing regulatory scheme mandated by 15 U.S.C. §757 is the long-term petroleum pricing policy contemplated by P.L. 94-99.¹² From

¹² The FEA itself has recognized that the Energy Act now encompasses a permanent scheme of regulation. In the regulatory preamble to 41 F.R. 36171, found in 4 CCH Energy Mgmt., ¶40, 294, the FEA stated at p. 40,566 that "[e]nactment of the EPCA [the Energy Act] on December 22, 1975, effectively changed the crude oil pricing program from one which was expected only to be temporary to one which would be mandatory for at least 40 months." Similarly, in §G at p. 40,573 of the same preamble, the FEA stated that "[t]he incentives offered under the tract-by-tract concept were better suited to the temporary program envisioned by CLC, but that in the more than two years since the two-tier system was first implemented those incentives had decreased in impact or effectiveness." In the same regulatory preamble, at p. 40,564, the FEA distinguished its function from that of the CLC, stating that the CLC perceived its statutory objective as primarily to control inflation under what was envisioned to be a short-term program under the authority of the Stabilization Act.

beginning to end, the regulatory scheme extends over ten years—an “emergency” reminiscent of the rule of the Caesars. Never before has this Court recognized an “emergency” of this duration.¹³ This scheme of regulation can no longer be regarded as a temporary response to a passing emergency. This long-term pricing policy has taken on the character of a “permanent substitute for the normal operation of competitive forces.” *Wilson v. Brown*, 137 F.2d 348, 352 (E.C.A. 1943). With the passing of the Energy Act, we have clearly gone beyond the point demarcated by Justice Holmes at which “[a] limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.” *Block v. Hirsch, supra*, 256 U.S. at 157. In essence, TECA has held that Congress may legislate in total disregard of constitutional limitations so long as it does so in forty-month intervals. TECA’s novel doctrine would ignore the pointed warning of Thomas Jefferson:

“Our peculiar security is in the possession of a written constitution. Let us not make it a blank paper by construction.” Thomas Jefferson, Vol. 4, *Writings* p. 506 (Wash. Ed. 1859).

This Court should grant certiorari to reestablish the previously well-settled constitutional distinction between permanent and temporary legislation.

(c) *The character and structure of the oil-pricing regulatory scheme is unique and unprecedented. This scheme involves, for the first time in our history, direct Congressional rate-making, and no statutory provision for just and reasonable rates.* The oil pricing regulatory scheme is an abrupt departure from traditional federal regulatory statutes such as the Natural Gas Act, 15 U.S.C. §717 *et seq.*, the Interstate Commerce Act, 49 U.S.C. §1, *et seq.*, and the Civil Aeronautics Act, 49 U.S.C. §1301, *et seq.* Every federal statute establishing comprehensive regulation, except the Allocation Act, as amended, expressly embodies a just and reasonable price standard.¹⁴ See, e.g., Federal Power Act, 16 U.S.C. §824(d); Natural Gas Act, 15 U.S.C. §717c; Interstate Commerce Act—rail carriers, 49 U.S.C. §316; Interstate Commerce Act—water carriers, 49 U.S.C. §905;

¹³And this would be but the beginning. As TECA expressly recognized in upholding the authority of the FEA to raise prices in the lower tier of the two-tier crude oil price system, the comprehensive market regulation of the crude oil industry is justified in substantial part by the difference between domestic costs (previously controlled) of crude oil and world costs. See *Nader v. Sawhill*, 514 F.2d 1064 (TECA 1974) (“Reams of economic analysis are not necessary to appreciate the inflationary impact of a sizeable ‘one-shot’ increase in the price of a commodity . . .”). The price rollback mandated by the Energy Act has exacerbated this problem and at the end of the presently legislated control period, this difference in cost would be greater than at the beginning of the controls. Affidavit, David W. Huettner, Ph.D., R. 162. Thus, the Energy Act would be, itself, a self perpetuating “emergency”—necessitating the indefinite extension of controls.

¹⁴Although there is precatory language in Section 4(b)(1)(F) of the Allocation Act (15 U.S.C. 753(b)(1)(F)) relating to the distribution of crude oil at “equitable prices”, it has been held that this is a “goal” which is not mandatory and is to be considered only as is practicable. *Consumers Union v. Sawhill*, 525 F.2d 1068 (TECA 1975) (en banc); *Air Transport Ass’n. v. Federal Energy Office*, 382 F.Supp. 437 (D.D.C. 1974), aff’d 520 F.2d 1339 (TECA 1975). Interestingly, the courts in both of these cases specifically noted that the FEA’s responsibility with respect to “equitable prices” under the Allocation Act, being precatory, is unlike the FPC’s obligation to set just and reasonable prices under the Natural Gas Act, which is mandatory.

Interstate Commerce Act—freight forwarders, 49 U.S.C. §1005; Civil Aeronautics Act, 49 U.S.C. §1374; Federal Communications Act, 47 U.S.C. §201; Packers and Stockyards Act, 7 U.S.C. §206.

Never before has Congress directly rolled back the price of a single commodity. Congress has controlled price increases in wartime on selected commodities and Congress has established a general price stabilization applicable to the economy as a whole but the price rollback mandated by §757(a) is unprecedented. This unprecedented act compels Supreme Court review.

(d) *This Court has never ruled on the constitutionality of the Congressional oil-pricing regulatory scheme.* The oil-pricing regulatory scheme directly affects a basic industry, the oil industry, with ramifications extending to the nation's economy, its foreign relations, and the constitutional rights of American citizens. Only this Court can settle the constitutionality of the Allocation Act, as amended by the Energy Act.¹⁵ As heretofore discussed, the oil pricing regulatory scheme is unprecedented. This action presents the question whether there are any constitutional constraints on economic regulation by the federal government. TECA has held, in essence, there are no limits to the power of Congress. The future course of American constitutional government depends upon a correct answer to the challenge here made to this unlimited power.

¹⁵TECA has ruled the Allocation Act as amended by the Energy Act constitutional on only one occasion: the present litigation. *Griffin v. United States*, 537 F.2d 1130 (TECA 1976), involved a challenge to the freezing of prices of old oil, and did not concern 15 U.S.C. §757. *Consumers Union v. Sawhill*, 525 F.2d 1068 (TECA 1975) (en banc) upheld the new oil tier of the two-tier system under the unamended Allocation Act. Furthermore, the statute was not under constitutional attack.

(e) *TECA has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.* In the consideration of the constitutionality of price control legislation, the ability of a regulated entity to withdraw from the market and void regulation is of fundamental importance. *Bowles v. Willingham*, 321 U.S. 503 (1944); *Block v. Hirsch*, *supra*; *Wilson v. Brown*, *supra*; *In Re Permian Basin Area Rate Cases*, *supra*; 390 U.S. at 836 (Douglas, J. dissenting); *The Constitution of the United States*, 1336 (E. S. Corwin, Editor, Lib. of Cong. 1972). TECA's discussion of this crucial issue is *irresponsible*:

"Second, plaintiffs erroneously contend that the Allocation Act, and §757 added by the Energy Policy Act, deprive the plaintiffs of the right to withdraw from the market. *No authority is cited for this contention.* Only the effect of unidentified private contractual agreements are mentioned. These agreements, if any, made by the plaintiffs were made voluntarily at the risk of the parties and cannot be the basis of a finding of facial unconstitutionality of §757 (App., p. A-33). (Emphasis added).

This statement is so patently false and ignorant, it is fairly characterized as irresponsible. Section 4(a) of the Allocation Act (15 U.S.C. §753(a)) directs the President "to promulgate a regulation providing for the mandatory allocation of crude oil...." Pursuant to this discretion, the FEA has promulgated 10 C.F.R. §211.63(a), which has been in effect in one form or another since January 15, 1974. In summary, this regulation requires all producers of crude oil to continue to sell to purchasers they were serving on the base date.¹⁶ The regulation

¹⁶The exit mechanisms prescribed by the regulation are not applicable to petitioners. See footnote 1, *supra*, at p. 5. Any right of exit for petitioners is therefore illusory. See *Mora v. Mejias*, 223 F.2d 814 (1st Cir. 1955). The overwhelming authority supporting petitioners' contention was specifically discussed at pp. 41-42 of petitioners' Brief in TECA and at pp. 9-11 of petitioners' Reply Brief.

was upheld by TECA in *Condor Operating Co. v. Sawhill*, 514 F.2d 351 (TECA 1975), cert. denied, 421 U.S. 976 (1975), on the basis that it was a temporary response to an emergency situation. *Id.*, 514 F.2d at 362. *Condor* held that a producer does not even have the option of using the oil himself—he must sell to the designated purchaser. The supplier/purchaser freeze is the heart of the mandatory allocation program and its effect is to compel the producer to market his crude oil at the regulated price. Unlike the conventional scheme of price control in which a regulated entity is free to avoid a confiscation by withdrawing its goods or services from the market, the Allocation Act locks the crude oil producer into the market, and, in effect, imposes upon him an affirmative duty to serve the public. TECA's ignorance of this regulation (despite petitioners' extensive discussion of it in their appellate briefs) so far departs from an accepted course of judicial proceedings that this Court should grant certiorari and exercise its power of supervision.

TECA's treatment of petitioners' fifth amendment challenge to §757 is graphic illustration of the need for the Supreme Court to grant certiorari. TECA has repudiated direct holdings of this Court, obliterated the constitutional distinction between temporary and permanent legislation, and has engaged in a course of conduct out of keeping with the accepted course of judicial proceedings. Furthermore, this petition brings before the Court the issue of the constitutionality of a statute unprecedented in the history of the United States, a statute affecting a vital industry with economy-wide implications. The people of the United States are entitled to have their Supreme Court address these issues.

2. *The Ninth Amendment.* TECA has decided a case of first impression, arising under the ninth amendment, which is of fundamental importance and consequence. This court should grant certiorari on the ninth amendment issue for the following reasons:

(a) TECA has squarely held that there exists no right to trust the federal government or rely on the integrity of its pronouncements. TECA has cast aside the fiduciary relationship created by the Constitution between government and people. Only this Court can restore that relationship.

(b) TECA's treatment of an important case of first impression is so superficial that only a considered analysis and opinion by this Court can settle the issue.

Each of these reasons is hereafter discussed.

(a) *TECA has squarely held that there exists no right to trust the federal government or rely on the integrity of its pronouncements. TECA has cast aside the fiduciary relationship created by the Constitution between the government and people.¹⁷ Only this Court can restore that relationship.*

Rule 19 of the Supreme Court Rules states, as a reason that will be considered for granting a writ, that a court of appeals "has decided an important question of federal law which has not been, but should be settled by this Court." This case, for the first time in American jurisprudence, raises the fundamental issue: Can the

¹⁷From the very outset of the nation's life, the concept of the public office as a trust given by the people to the office-holder was enunciated and accepted. See Essays No. 50, at p. 317 and No. 57, at pp. 350, 352, *The Federalist Papers* (New American Lib. Ed. 1961) (hereinafter referred to as *The Federalist*). The Nation therefore stands in the shoes of a trustee or agent as regards the people. See Essays No. 46, at p. 294, and No. 78, at p. 467, *The Federalist Papers* (New American Lib. Ed. 1961). The opinion of *The Federalist Papers* is considered by this Court to be of great authority. *Cohens v. Virginia*, 19 U.S. (6 Wheat) 265, 418 (1821); *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 433 (1819).

American people trust their government and rely on the integrity of their government's pronouncements? TECA has unequivocally held No!

"Plaintiffs seek to secure from this Court a ruling, admittedly without precedent, that there exists a hitherto judicially unrecognized and undefined individual constitutional right under the Ninth Amendment 'to trust the federal government and to rely on the integrity of its pronouncements.' We find no basis in constitutional history, judicial interpretation, political history, legal scholarship, or persuasive argument to conclude that such a right exists under the Ninth Amendment, or any other provision of the Constitution of the United States." (App., pp. A-22, 23).¹⁸

In keeping with this Court's high station as guardian of the Freedom of the American people, a station it has boldly exercised in the past, this Court must grant certiorari to review this incredible decision. See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *New York Times Co. v. United States*, 403 U.S. 713 (1971).

While the nation can put its trust in God, in TECA's eyes, the American people cannot put their trust in the federal

¹⁸It is to be noted that TECA went beyond what the parties at oral argument framed the issues to be. The respondents chose to contend that while a ninth amendment "right to trust" may exist, that this case was not the proper case to decide the issue. The unseemly rush to judgment orchestrated by TECA is another illustration of the superficial treatment accorded petitioners on the ninth amendment claim.

government. Only this Court has the authority and power to definitively and authoritatively settle the issue.

The petitioners' claim is admittedly unprecedented. However, the occasion for petitioners' claim is likewise unprecedented. Never before, in the two hundred year history of our nation, has Congress ever rolled back the price of a single commodity. The right petitioners' claim has never been more needed than now, as the power of the federal government to affect its citizens and the quality of their daily lives steadily increases. See *Osborn v. United States*, 385 U.S. 323, 342 (1966), (Douglas, J. dissenting); Bertelsman, *The Ninth Amendment and Due Process of Law—Toward a Viable Theory of Unenumerated Rights*, 37 Cinn.L.Rev. 777, 786-7 (1968).

(b) TECA's treatment of an important case of first impression is so superficial that only a considered analysis and opinion by this Court can settle the issue. TECA's opinion concerning petitioners' ninth amendment claim is superficial, and reflects on its face an unseemly haste to validate the legislation attacked by petitioners, without regard to logical thought or legal reasoning. In general, the tone of TECA's opinion concerning petitioners' ninth amendment claim reflects indignity at the effrontery of the petitioners in suggesting that one has a right to trust the government and rely on the integrity of its pronouncements where the announced purpose of those pronouncements is to induce one to follow a specific course of action. TECA alludes to "copious and unrestrained citations", and to "an exceedingly long, indiscriminate list of federal and state judicial decisions, legal articles, political essays, including some from *The Federalist Papers*, and other sources mentioned above." TECA then, in effect, holds that the petitioners have no right to trust and rely on governmental pronouncements because the petitioners did not cite to TECA any case squarely on point establishing the existence of that right. The fact that petitioners'

claim is unprecedented does not, however, brand petitioners' claim as unsubstantial *per se*.¹⁹ *Lamont v. Commissioner of Motor Vehicles*, 269 F.Supp. 880 (S.D.N.Y.) (1967); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

The petitioners admit that the issue here presented is unprecedented precisely in that no prior case has established the existence of the right here claimed. However, the petitioners vehemently assert that the decisions, articles, essays and the like, cavalierly dismissed by TECA as not being on point, conclusively demonstrate that the ninth amendment is a repository of affirmative rights, and that among those rights is the right to trust the government and rely on the integrity of its pronouncements.

¹⁹In *Pavesich*, the Supreme Court of Georgia judicially recognized the right of privacy, antedating the right of privacy revolution engendered by *Griswold v. Connecticut*, 381 U.S. 479 (1965). Justice Cobb, in discussing the role of a court in recognizing a novel claim, stated:

"The entire absence for a long period of time, even for centuries, of a precedent for an asserted right should have the effect to cause the courts to proceed with caution before recognizing the right, for fear that they may thereby invade the province of the lawmaking power; but such absence, even for all time, is not conclusive of the question as to the existence of the right." *Id.*, 50 S.E. 2d at 69.

Justice Cobb's comments apply with greater force when construing a constitution, a document intended to endure for ages and to be adapted to current conditions. See e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 407, 415 (1819); *Weems v. United States*, 217 U.S. 349, 373 (1910).

The right is implicit in the concept of "ordered liberty",²⁰ is "rooted in the conscience and the traditions of our people",²¹ and is one of "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."²²

Petitioners pray for the opportunity to demonstrate the existence of the right to this Court.

The cavalier treatment of the petitioners' claim by TECA is reflected in TECA's discussion of *Griswold v. Connecticut*, *supra* and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). In essence, TECA finds those cases inapposite because neither case expressly holds that the right exists (noting, for example, that *Virginia State Board* is "clearly an application of the First Amendment only, and not in point . . .", Opinion, 20). A narrow reading of those cases does not reveal a holding that the petitioners' claim is correct. *Griswold* and *Virginia State Board* do, however, reveal underlying deep-rooted constitutional principles which support the petitioners' claim.

Griswold recognized a constitutional right not enumerated in the Constitution—the right of privacy. This right of privacy is found to exist in the penumbras of certain amendments, including the ninth. Although *Griswold* certainly did not find a ninth amendment right to trust the government and rely on the integrity of its pronouncements, *Griswold* does stand for the principle that there are unenumerated rights subject to judicial recognition. An adoption of TECA's novel methodology would have produced a completely different decision in *Griswold*.

²⁰*Palko v. Connecticut*, 302 U.S. 319, 325 (1937)

²¹*Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)

²²*Powell v. Alabama*, 287 U.S. 45, 67 (1932)

Virginia State Board involves restrictions on advertising of prescription drug prices. The Supreme Court held that the consumers purchasing the drugs had standing to assert the invalidity of the ban on price advertising. This Court held that the right to receive information is the correlative of the first amendment right to distribute information. This Court also held that the right to receive information is not limited to the political sphere but embraces the economic sphere. The petitioners seek only an application of this principle. The right to rely on government pronouncements in the conduct of one's business is the correlative of the right of the government to govern one's business by pronouncement. TECA failed to address itself to this crucial issue.

The cavalier treatment of the petitioners' claim by TECA is similarly reflected in TECA's analysis of the concepts of "trust" and "reliance", integral parts of the petitioners' claim that they have been wronged. The petitioners were deliberately induced by the government to invest in oil and gas drilling in reliance on government pronouncements. TECA simply asserts:

"Giving to the word 'trust' the meanings most favorable to [petitioners], that of assured reliance or confident expectation, it still describes a subjective condition of individual minds that simultaneously may be absent in some minds and present in other minds in varying degrees, forms, and substances. This concept of 'trust' is not suitable for defining a constitutional right enjoyed by all citizens or persons, however well it may serve in a motto. The same things can be said of the word 'rely' as used by [petitioners]." (App. A-27).

TECA's analysis is ridiculous. If seriously applied, it would obliterate the common law of fraud, deceit and misrepresentation and the concept of "fraud" under federal securities laws.

Congress has chosen to disregard constitutional limitations in its revolutionary and unprecedented rollback of crude oil prices. TECA has validated that action. The issues herein presented are of fundamental importance. Notwithstanding TECA's assertion that "[A] careful reading of each of *The Federalist Papers*, Nos. 11, 44, 45, 46, 50, 57, 62, 78, 84, and 85, relied on primarily by [petitioners], fails to reveal any language, express or implied, supporting the existence of the claimed Ninth Amendment right", one of the fundamental purposes of the formation of our government under the Constitution was to obviate disruptive legislative practices which had made the conduct of commerce and industry difficult in America.²³

Hamilton wrote:

"The additional securities to republican government, to liberty, and to property, to be derived from the adoption of the plan under consideration, consist chiefly in the restraints which the preservation of the Union would impose on local factions and insurrections, and on the ambition of powerful individuals in single States who might acquire credit and influence enough from leaders and favorites to become the despots of the people;...and in the precautions against the repetition of those practices on the part of the State governments which have undermined the foundations of property and credit, have planted mutual distrust in the breasts of all classes of citizens, and have occasioned an almost universal prostration of morals."²⁴

²³See Essay No. 11, *The Federalist*.

²⁴Essay No. 85, *The Federalist* at pp. 521-522.

The state practices condemned by Hamilton are vividly described by Madison:

"The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become tools in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society."²⁵

Again, Madison emphasizes the fundamentality of the right to trust the government and rely on the integrity of its pronouncements:

"In another point of view, great injury results from an unstable government. The want of confidence in the public councils damps every useful undertaking, the success and profit of which may depend on a continuance of existing arrangements. What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer will lay himself out for

the encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconstant government? In a word, no great improvement or laudable enterprise can go forward which requires the auspices of a steady system of national policy."

"But the most deplorable effect of all is that diminution of attachment and reverence which steals into the hearts of the people towards a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. *No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable without possessing a certain portion of order and stability.*"²⁶

The Federalist's discussion of "fluctuating policy" is prophetic. The government has engaged in the practices condemned by Hamilton and Madison. As announced by the government, the fundamental purpose of the two-tier crude oil price system was to induce investment in domestic exploration as well as the investment in the development and use of high-cost enhanced recovery methods for depleted or marginal wells. The means of inducement was the prospect of world market prices for the favored categories of new and released oil, a prospect which has now been destroyed by §757.

Petitioners trusted the government and relied on its representations that the purpose of the two-tier crude oil price system was to provide an incentive to induce investment in domestic exploration and investment in the development and use

²⁵Essay No. 44, *The Federalist* at pp. 282-283 [emphasis added].

²⁶Essay No. 62, *The Federalist* at pp. 381-382 [emphasis added].

of high-cost enhanced recovery methods for depleted and marginal wells. Heeding the government's exhortation to increase their drilling and development activities, the petitioner MAPCO Inc., from August 1973 to December 22, 1975, expended in excess of \$43,800,000 directly attributable to the exploration for and development of reserves of crude oil, and the petitioner Manhart expended \$28,000.

The petitioners were entitled to rely on the government pronouncements. Never in the two-hundred year history of the nation had the government sought to roll back the prices of a single commodity—a rollback unrelated to the price set by the free market. The petitioners' ninth amendment right to trust the federal government and rely on the integrity of its pronouncements has been violated.

This Court has previously assumed a role of leadership in protecting constitutional rights.²⁷ Petitioners respectfully ask this Court to take the mantle of leadership once more. More than that, in the name of a citizenry increasingly trampled upon by the federal government, your petitioners demand it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the case set for briefing and argument this term.

²⁷*Roe v. Wade*, 410 U.S. 113 (1973); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Baker v. Carr*, 369 U.S. 186 (1962); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Elrod v. Burns*, 427 U.S. 347 (1976).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that, in accordance with Rule 33(1), (2a) of the Revised Rules of the

Supreme Court of the United States, three true and correct copies of the foregoing Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States have been delivered to Hon. Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Room 5143, 10th Street and Constitution Avenue, N.W., Washington, D.C. 20530, by placing the same in the United States mail with first class postage prepaid, certified mail, return receipt requested, correctly addressed, on this 12th day of April, 1978.

Duke R. Ligon
Duke R. Ligon

APPENDIX

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MAPCO, INC., et al.,)
)
Plaintiffs.,)
)
vs.) **75-C-573-B**
)
GERALD R. FORD, President of)
United States, et al.,)
)
Defendants.)

ORDER CERTIFYING CONSTITUTIONAL QUESTIONS
TO THE TEMPORARY EMERGENCY
COURT OF APPEALS

MAPCO, Inc., hereinafter referred to as "MAPCO" is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business in the Northern District of Oklahoma. T. A. Manhart, hereinafter referred to as "MANHART", is a citizen of the State of Oklahoma, residing in the Northern District of Oklahoma.

The plaintiffs are engaged in the business of exploring for and developing reserves of crude oil, and extracting and marketing such crude oil to refineries and other purchasers, in the Northern District of Oklahoma, and in other parts of the United States. (Plaintiffs' brief, page 3; Affidavit of Robert E. Thomas; Affidavit of T. A. Manhart.)

Gerald R. Ford was the President of the United States when the instant litigation was commenced. He has been succeeded in that office by Jimmy Carter.

Frank G. Zarb was the Administrator of the FEA when the litigation was commenced. He has been succeeded in that office by John H. O'Leary.

The FEA is an agency and instrumentality of the United States under the Federal Energy Administration Act of 1974, 15 U.S.C. §761, *et seq.*; and was established by Executive Order No. 11790 (June 27, 1974). The FEA is charged with administering the Allocation Act, as amended by the EPCA and the Energy Conservation and Production Act (ECPA), P.L. 94-385.

This action was commenced to enjoin the implementation and enforcement of Section 8(a) of the Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 628, 15 U.S.C. §751, *et seq.* (The Allocation Act, as amended by Section 401(a) of the Energy Policy and Conservation Act of 1975, P.L. 94-163, 89 Stat. 871, 42 U.S.C. §6201).

The matter is presently before the Court on cross-motions for summary judgment and the motion to dismiss as to the President of the United States.

The Court finds that this litigation raises substantial constitutional questions, in that plaintiffs contend that Section 8(a) is constitutionally infirm under the Fifth Amendment because, on its face, it does not provide a non-confiscatory standard for regulating the price of domestically produced crude oil; and because, as applied it confiscates plaintiffs' property without just compensation and due process of law. Plaintiffs also contend that Section 8(a) violates the Ninth Amendment right to trust the Federal Government and rely on the integrity of its

pronouncements. Accordingly, plaintiffs ask the Court to enjoin the implementation and enforcement of Section 8(a) of the Allocation Act.

Section 211(c) of the Economic Stabilization Act of 1970, found in 12 U.S.C. §1904 (Note) provides:

"In any action commenced under this title in any district court of the United States in which *the court determines that a substantial constitutional issue exists*, the *court shall certify* such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition." (Emphasis supplied).

Section 211(c) of the Economic Stabilization Act, has been incorporated in Section 5(a)(1) of the Allocation Act, 15 U.S.C. §754(a)(1), as amended by Section 452 by the EPCA, and controls the jurisdiction of this Court to decide the constitutional questions raised by the plaintiffs in this action.

This Court hereby certifies all constitutional issues raised by the parties in their pleadings and memoranda filed in this Court to the Temporary Emergency Court of Appeals for appropriate disposition. *National Petroleum Refiners Association v. Dunlop*, 486 F.2d 1388 (TECA 1973).

IT IS SO ORDERED.

ENTERED this 13th day of September, 1977.

**CHIEF UNITED STATES
DISTRICT JUDGE**

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 10-13

MAPCO INC. and THOMAS A. MANHART.

Appellants-Plaintiffs.

v.

JIMMY CARTER, PRESIDENT,
JAMES R. SCHLESINGER, SECRETARY OF ENERGY,
and DEPARTMENT OF ENERGY.

Appellees-Defendants.

BEFORE HONORABLE A. SHERMAN CHRISTENSEN,
HONORABLE WILLIAM H. BECKER,
and JOHN K. REGAN, JUDGES.

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

In consideration whereof it is ORDERED that plaintiffs' motion for summary judgment is denied in respect to each ground on which §757 is challenged as unconstitutional. Defendants' motion for summary judgment is granted on each of these grounds. It is further ORDERED that judgment be, and it is hereby, entered for defendants on the constitutional issues.

This action is hereby remanded to the United States District Court for the Northern District of Oklahoma for further proceedings consistent with this opinion.

FOR THE COURT:

Ruth H. Jacobson
Clerk

March 14, 1978

District Court No. 75-C-573-B

Temporary Emergency Court of Appeals
of the United States

No. 10-13

MAPCO INC. and THOMAS A. MANHART.

Appellants-Plaintiffs.

v.

JIMMY CARTER, PRESIDENT,
JAMES G. SCHLESINGER, SECRETARY OF ENERGY,
and DEPARTMENT OF ENERGY,

Appellees-Defendants.

On Certification From
The United States District Court
For the Northern District of Oklahoma

(No. 75-C-573-B)

(Argued November 18, 1977

Decided March 14, 1978)

Frederic Dorwart, Holliman, Langholz, Runnels & Dorwart, Tulsa, Oklahoma, with whom David W. Holden and J. Michael Medina of the same firm, and Duke R. Ligon and John H. Buck of Bracewell & Patterson, Washington, D.C., were on the brief for the Plaintiffs-Appellants.

John N. Hanson, Department of Justice, Washington, D.C., with whom Barbara Allen Babcock, Assistant Attorney General, and Dennis G. Linder, were on the brief for the Defendants-Appellees.

Before Christensen, Becker and Regan, Judges.

Becker, Judge:

In December 1975, this action was filed by plaintiff Mapco Inc. against Gerald R. Ford, then President of the United States (President), The Federal Energy Administration (FEA), and Frank G. Zarb, then Administrator of the FEA (Administrator). In March 1976, Thomas A. Manhart (Manhart) was permitted to intervene in the action as plaintiff. Pursuant to Rule 25(d), F.R. Civ. P., the District Court substituted in their official capacities Jimmy Carter, successor to Gerald R. Ford, as President, and John F. O'Leary, successor to Frank G. Zarb, as Administrator.

As of October 1, 1977, pursuant to the Department of Energy Organization Act, (DOE Act) P.L. 95-91, 91 Stat. 565, 42 U.S.C. 7101, *et seq.*, and Executive Order 12009 (42 F.R. 46267), FEA and its functions were transferred to the Department of Energy (DOE) of which James G. Schlesinger is Secretary. Pursuant to Rule 43(c), F.R.A.P., DOE and James G. Schlesinger are hereby substituted as appellees and defendants for FEA and Administrator O'Leary.

Since this action was certified to this Court, rather than appealed, the parties will be referred to as plaintiffs and defendants. *Cf. Griffin v. United States* (Em.App. 1976) 537 F.2d 1130, 1.c. 1133.

It is admitted that plaintiff Mapco Inc. is a Delaware corporation, with its principal place of business in the Northern District of Oklahoma, engaged in the business of producing and selling crude oil to refineries and other purchasers in the States of Oklahoma, Utah, Kansas, and Wyoming; that intervening plaintiff Manhart is a citizen of Oklahoma, residing in the Northern District thereof, and engaged in the business of exploring for and developing reserves of crude oil, extracting and marketing such crude oil to refineries and other purchasers in Oklahoma and other parts of the United States (Defendants' Br. 2).

In this action, plaintiffs sought to enjoin the defendants from implementing and enforcing the provisions of Section 401(a) adding new Section 8(a) of the Energy Policy and Conservation Act of 1975 (Energy Policy Act), P.L. 94-163, 89 Stat. 871, 42 U.S.C. §6201, *et seq.*, and 15 U.S.C. §751, *et seq.*, to the Emergency Petroleum Allocation Act of 1973 (Allocation Act),¹ P.L. 93-159, 87 Stat. 628, 15 U.S.C. §751, *et seq.* The Energy Policy Act amended the Allocation Act and the Energy Conservation and Production Act (Energy Act), P.L. 94-385, 90 Stat. 1125, 42 U.S.C. §6801, *et seq.*

Section 401(a) of the Energy Policy Act, attacked by the plaintiffs, is found in Part A, Title IV thereof. As stated above, Section 401(a) added to the Allocation Act as a new Section 8(a), among others. Section 8(a) is codified as 15 U.S.C. §757. Although plaintiffs refer to 15 U.S.C. §757 as §401(a), and the District Court and defendants refer to it as Section 8(a) of the Allocation Act, for clarity we will refer to the challenged legislation as 15 U.S.C. §757, or as §757, except in quoted material.

In January 1976, counsel for the defendants filed a motion to dismiss for Gerald R. Ford, then President of the United States, on the grounds (1) that he is not subject to the jurisdiction of the district court, and (2) that he is not a necessary party to the action (R. 29).

Plaintiff Mapco propounded first written interrogatories to the defendants in January 1976 (R. 19) which were answered by the defendants (R. 50). Thereafter, in February 1976, plaintiff Mapco propounded to the defendants second written interrogatories (R. 81) which were answered in April 1976 by the defendants (R. 106), who treated some of the interrogatories as

¹The "Act" in *Consumers Union of U.S., Inc. v. Sawhill*, 525 F.2d. 1068, at page 1071.

requests for admissions under Rule 36 of the Federal Rules of Civil Procedure.

On June 2, 1976, plaintiffs filed a motion for summary judgment supported by affidavits. In July 1976, defendants moved to strike (R. 180) parts of the supporting affidavits of Robert E. Thomas (R. 130) and T. A. Manhart (R. 132), and Exhibit B to the affidavits of Burnet Vance Davis (R. 135), Lawrence J. Gitman (R. 147), and David A. Huettner (R. 162), on the grounds that they contained opinions, conclusions, argument, speculation, and were objectionable because they contained irrelevant, immaterial, and inadmissible evidence. Defendants thereby recorded their legal contention that the challenged portions of these affidavits did not state "facts established" because "defendants have submitted no controverting evidence" as contended by plaintiffs (Plaintiffs' Br. 2).

On May 10, 1976, the defendants filed a motion for dismissal or, in the alternative, for summary judgment. (The motion of plaintiffs for summary judgment and of defendants for dismissal or, in the alternative, for summary judgment, and briefs in support thereof were not included in the Record on Appeal. Copies were supplied at the request of this Court.)

**Certification by the District Court
of Constitutional Questions to the
Temporary Emergency Court of Appeals**

In September 1977, before the determination of any of the pending motions, the district court entered an Order certifying constitutional questions to the Temporary Emergency Court of Appeals.

In that Order the following was recited:

"The Court finds that this litigation raises substantial constitutional questions, in that plaintiffs contend that Section 8(a) is constitutionally infirm under the Fifth Amendment because, on its face, it does not provide a nonconfiscatory standard for regulating the price of domestically produced crude oil; and because, as applied it confiscates plaintiffs' property without just compensation and due process of law. Plaintiffs also contend that Section 8(a) violates the Ninth Amendment right to trust the Federal Government and rely on the integrity of its pronouncements. Accordingly, plaintiffs ask the Court to enjoin the implementation and enforcement of Section 8(a) of the Allocation Act.

"Section 211(c) of the Economic Stabilization Act of 1970, found in 12 U.S.C. §1904 (Note) provides:

'In any action commenced under this title in any district court of the United States in which *the court determines that a substantial constitutional issue exists*, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.' (Emphasis supplied).

"Section 211(c) of the Economic Stabilization Act, has been incorporated in Section 5(a)(1) of the Allocation Act, 15 U.S.C. §754(e)(1), as amended by Section 452 by the EPCA, and controls the jurisdiction of this Court to decide the constitutional questions raised by the plaintiffs in this action.

"This Court hereby certifies all constitutional issues raised by the parties in their pleadings and memoranda filed in this Court to the Temporary Emergency Court of Appeals for appropriate disposition. *National Petroleum Refiners Association v. Dunlop*, 486 F.2d 1388 (TECA 1973)" (R. 210-211).

Exclusive Jurisdiction of Temporary Emergency Court of Appeals

The provisions of P.L. 92-210, December 22, 1971, amending §211(c) of the Economic Stabilization Act of 1970 (Stabilization Act), August 15, 1970, 12 U.S.C. §1904, Note, creating the Temporary Emergency Court of Appeals, and providing for its exclusive jurisdiction have been preserved despite the expiration of the Stabilization Act on April 30, 1974, through subsequent legislation, including the recent DOE Act, P.L. 95-91, Title V, §502, the applicable earlier §5(a) of the Allocation Act, and §§461, 523(b), and 401(8h) of the Energy Policy Act. By virtue of the foregoing statutory authorities, exclusive jurisdiction to determine the constitutional questions certified in this action is vested in this Court.

Issues Presented

Plaintiffs contend that the issues presented for review are:

1. Whether 15 U.S.C. §757 (referred to as Section 401(a) by plaintiffs) of the Energy Act violated the Ninth Amendment right to trust the federal government and rely on the integrity of its pronouncements.
2. Whether 15 U.S.C. §757 of the Energy Act is unconstitutional because it fails to provide a non-confiscatory standard for price regulation.
3. Whether 15 U.S.C. §757 of the Energy Act is unconstitutional because there is no real and substantial relation between the price rollback mandated by §401(a) and any proper legislative purpose (Plaintiffs' Br., unnumbered page 1).

According to the defendants, the issues presented, in inverse order, are:

1. Whether the Allocation Act, as amended by the Energy Act, on its face, violates the Fifth Amendment by failing to provide proper standards for regulating the prices of domestically produced crude oil.
2. Whether the application of 15 U.S.C. §757 (referred to as Section 8(a) by the defendants) of the amended Allocation Act to the plaintiffs violates the Fifth Amendment.
3. Whether the Ninth Amendment prohibits the implementation and enforcement of 15 U.S.C. §757 of the amended Allocation Act (Defendants' Br. 15).

These issues will be discussed and decided in the order presented by the plaintiffs.

THE NINTH AMENDMENT QUESTION

Plaintiffs' Ninth Amendment Argument

An understanding of plaintiffs' novel Ninth Amendment contention requires a preliminary review of the "two-tier" price regulations held valid in *Consumers Union of U.S., Inc. v. Sawhill* (Em.App. 1975) 525 F.2d 1068. These regulations, and the "two-tier" pricing system for "old oil" and "new and released oil" adopted thereby, are concisely described in the following quotation (footnotes omitted) from the majority opinion in that case, at pages 1074 to 1077, inclusive, as follows:

"The regulations at issue adopted, essentially unchanged, the so-called 'two-tier' price system originally implemented by CLC as part of its Economic Stabilization Program. As both parties agree, 'old oil—oil from properties producing at, or less than, their 1972 production level—is subject to the 'ceiling price rule,' and accounts for approximately 60 percent of domestic crude production. Although accounting for approximately 13 percent of domestic crude production, stripper wells, those producing less than ten barrels per day, are specifically exempt from allocation and price controls. 15 U.S.C. §753(e)(2). FEA's regulation of the remaining oil, 'new' and 'released,' which account for 16 and 11 percent respectively of domestic crude production, is at the heart of this dispute.

"The price of both new and released crude oil is determined pursuant to the 'special release rule.' Thus, new crude oil, equal to the amount of domestic crude produced and sold from a property in a specific month above the amount produced and sold from that

property during a base month in 1972, may be sold without regard to the ceiling price, i.e., at the market price. If a particular property did not produce at all in 1972, the base year, then all of its current production is new oil and accordingly, may be sold at the market price.

"For released oil the special release rule presents a more complicated situation. Where a property is now producing in excess of its 1972 production level, that oil produced up to the 1972 level is released oil; of course, the excess is new oil. The maximum allowable price for released oil is the lesser of the current market price on the price derived pursuant to a formula established by the special release rule. The formula engenders a price for released oil that is a function of the base period production level, the May 15, 1973 posted price, the current market price, and the amount by which current production exceeds base period production. The result is that when a producer's revenues from a sale of new and released oil from a particular property are averaged, the *weighted average price* may be well below the current market price. Most importantly, FEA's analysis of the formula at work vividly illustrates its inherent production incentive."

Relying on the regulations upheld in *Consumers Union of U.S., Inc. v. Sawhill, supra*, the plaintiffs, in their original brief, described their Ninth Amendment contentions in the following language:

"The fundamental and announced purpose of the two-tier crude oil price system was to induce investment in domestic exploration as well as the investment in the development and use of high-cost

enhanced recovery methods for depleted or marginal wells. Consistent with the intent of those who devised it, the two-tier crude oil price system operated as an intricate administrative mechanism which—through the favored treatment of new oil coupled with the released oil device—sought to induce and did induce the plaintiffs and others to invest large sums of capital in exploration for new reserves and in secondary recovery of existing reserves.

"The means of inducement was the prospect of world market prices for the favored categories of new and released oil, a prospect which has now been destroyed by the Energy (Policy) Act. At the time of promulgation of the two-tier crude oil price system, the government represented that the purpose of the two-tier crude oil price system was to provide an incentive to induce investment in domestic exploration and investment in the development and use of high-cost enhanced recovery methods for depleted or marginal wells.

"In reliance on the two-tier crude oil price system and the representation of the defendants as to the purpose of adoption of the two-tier crude oil price system, and in reliance on expressed exhortations of the defendants addressed to the plaintiffs and to other crude oil producers, calling upon them to increase their drilling and development activities, the plaintiff Mapco from August, 1973, to December 22, 1975, expended in excess of \$43,800,000.00 directly attributable to the exploration for and development of reserves of crude oil, and the plaintiff Manhart expended \$28,000.00." (Plaintiffs' Br. 6-7).

In support of their contention that 15 U.S.C. §757 violates the plaintiffs' right under the Ninth Amendment to trust the Federal Government and to rely on the integrity of its pronouncements, plaintiffs assert that the crude oil price "rollback" mandated by 15 U.S.C. §757 violated the plaintiffs' "right to trust the federal government and to rely on the integrity of its pronouncements." This contention is argued at great length with copious and unrestrained citations to federal and state cases, law review articles, *The Federalist Papers*, other sources of constitutional history, and the challenged affidavits filed in the district court. (Plaintiffs' Br. 9-30). On this one point alone, plaintiffs cite 142 different authorities, including 50 cases, none of which supports plaintiffs' contention.

In this section of plaintiffs' brief, in an attempt to bring its general and multifarious Ninth Amendment contentions within relevant bounds, plaintiffs summarize their Ninth Amendment contentions in a discussion of the five proposed relevant questions claimed to be involved in determining the validity of §757:

- "1. Whether the new rule represents an abrupt departure from a well-established practice or merely an attempt to fill a void in an unsettled area of law.
- "2. Whether the party against whom the new law applies relied on the former law.
- "3. Whether retroactive application of the statute imposes a burden.
- "4. Whether the government has demonstrated a compelling governmental interest to support the infringement.
- "5. Whether a less restrictive alternative exists" (Plaintiffs' Br. 25, *et seq.*).

Plaintiffs' reply brief is much more revealing than the generalities of their original brief. Their reply brief on the Ninth Amendment issue states, among other things, the following:

"The defendants misconceive the entire thrust of the plaintiff's [sic] complaint. The plaintiffs' contention is that the ninth amendment right to trust the government and rely on the integrity of its pronouncements has been violated, *not by the imposition of price controls, but by the retroactive rollback of prices* (note omitted). It is the retroactive application of the price rollback mandated by the Energy Act that breaches the right of trust. The power of the government to impose price controls over new oil, or even to lower new oil prices prospectively is not presently challenged. The plaintiffs challenge the *retroactive application* of the crude oil price rollback to include oil that was discovered as a result of investments made pursuant to intentional inducement by the government. Nothing that the defendants have asserted casts the slightest doubt on this essential point" [note omitted] (Plaintiffs' Reply Br. 5-6).

Defendants' Ninth Amendment Argument

Defendants' answer to the Ninth Amendment contention is in four parts.

First, defendants assert that plaintiffs have not demonstrated that the defendants in the Executive branch have "pronounced, stated or otherwise promised" that the price of upper-tier crude oil would remain at the market level set by the OPEC cartel; that the fact that the purpose of favored treatment for upper-tier oil was to provide additional economic incentive

for the production of such oil does not mean that the defendants or Congress at any time warranted that such favored treatment (1) would always continue, and (2) if so, at OPEC prices; that there is nothing in the statute, its regulations, or defendants' statements or actions which support such an alleged promise; that while plaintiffs state that §757 abrogates the two-tier system and destroys the possibility of favored treatment for upper-tier oil, §757 retains both the two-tier system and favored treatment for upper-tier oil, citing *Griffin v. United States* (Em.App. 1976), 537 F.2d 1130, l.c. 1139, fn.26.

Second, defendants argue that, prior to the Energy Policy Act amendments to the Allocation Act, prices for new and released oil were not uncontrolled free market prices, but were prices which the Federal Energy Administration controlled but permitted to rise to market level, citing recognition and approval of this action by the Temporary Emergency Court of Appeals, *en banc*, in *Consumers Union of U.S., Inc. v. Sawhill* (Em.App. 1975), 525 F.2d 1068, l.c. 1077-1079. Defendants state that if plaintiffs were in fact induced to make capital investments because they thought new and released domestic crude oil prices were not being controlled, the inducement resulted from plaintiffs' misunderstanding of the law.

Third, defendants argue that if plaintiffs were induced to make capital investments because they expected new and released domestic crude oil prices would be allowed to remain at market levels, that inducement also resulted from their own misunderstanding of the law, citing *People of the State of California v. Simon* (Em.App. 1974), 504 F.2d 430, cert. denied 419 U.S. 1021.

In this connection, defendants contend that estoppel cannot be employed to prohibit a federal officer or agency from taking

action found to be necessary in the public interest. *Loftus v. Mason*, (C.A.4) 204 F.2d 428, 1.c.435.

Fourth, defendants note that the challenged two-tier pricing system with its fixed upper-tier price ceiling is a product of the legislative branch of the government which defendants were required to follow, while the earlier two-tier pricing system was a product of the Executive branch of the government which did not impose the current challenged controls. Further, defendants argue that even assuming the plaintiffs had a right to expect continued market level prices for new and released domestic crude oil, federal regulation of future action of a right previously acquired is not prohibited by the Constitution. Further, defendants argue that if a Ninth Amendment right to expect continued market level prices for new and released crude oil exists, it is subject to proper federal regulation, citing *United Public Workers v. Mitchell*, 330 U.S. 75, 1.c. 94-104.

Purpose and Effect of the Addition in 1975 of §757 to the Allocation Act

The Energy Policy Act, enacting the new §757 and adding it to the Allocation Act, became effective December 15, 1975. The crude oil price controls under the Allocation Act of 1973 existing before December 15, 1975, and the purpose and effect of new §757 are described in the following excerpts from House Report No. 94-340 accompanying H.R. 7014 containing the original draft of §757:

"Existing Price Controls

"The Emergency Petroleum Allocation Act of 1973, was enacted in November, 1973, against a background of severe shortage of crude oil and its

products. The principal aims of the Act were to meet the nation's priority petroleum needs, to distribute the remaining available products equitably, and at equitable prices, and to accomplish these objectives in ways that would preserve the competitive viability of the independent segments of the industry. At the time the Allocation Act was passed, price control authority over the petroleum industry and the rest of the economy as well was lodged in the Cost of Living Council which had discretionary price and allocation authority under the terms of the Economic Stabilization Act of 1970. Upon enactment of the Allocation Act, the newly-created Federal Energy Office (now the Federal Energy Administration) assumed responsibility for petroleum pricing and allocation.

"The Economic Stabilization Act has since expired and the Allocation Act today constitutes the only Federal authority for the control of petroleum prices. The current price regulatory system finds its roots in the regulations prescribed by the Cost of Living Council in August, 1973, during the so-called 'Phase IV' sector-by-sector approach to economic controls. These regulations provided (and their successor regulations still provide) for classification of domestically produced crude oil into 'old' and 'new' designations.

"Current regulations, thus, establish a 'two-tier pricing system' which imposes a price ceiling on that classification of crude oil which is denominated as 'old oil' while allowing other classifications to sell at the

market. Under the existing regulation, old oil (that is, oil from properties producing at, or less than, their 1972 production levels) is controlled at the price which prevailed in the field on May 15, 1973, plus an additional \$1.35 per barrel. This formula results in a national average price for such oil of about \$5.25 per barrel.

"At present, 'old oil' constitutes approximately 66 percent of domestic production or 5.6 million barrels a day. According to April field-price postings, the remaining 33 percent of domestic production which is not price-regulated sold at market prices of almost \$12.00 per barrel. Imported crude oil, also not price-regulated, sold for a landed cost of \$12.63 per barrel in January of this year. Since that time the President has added an additional \$2.00 per barrel import fee (the first in February; the second in June of this year).

"The addition of these fees has had the effect of further increasing the price of imported crude oil to an estimated \$14.50 per barrel. Presumably the unregulated domestic price has also increased above \$12.00 per barrel in response to the addition of the second dollar fee in June, but it is impossible at this time to measure that increase with any degree of precision.

"Section 301 of the Committee's bill proposes to amend the Emergency Petroleum Allocation Act by adding a new section which incorporates a statutory standard for price regulation of domestic crude oil production.

* * * *

"Statutory Price Ceiling

"New section 8 of the Emergency Petroleum Allocation Act (15 U.S.C. §757) proposed to be added by this bill would, therefore, rollback unregulated prices under a formula which yields a per barrel price of approximately \$7.50. The President would be permitted to set higher prices for certain additional classifications of oil production." (2 U.S. Code Congressional and Administrative News 1762, at pages 1799, 1800, and 1804.)

The "rollback" of domestic crude oil (upper-tier) prices mandated by §757 was accomplished by the President and FEA by executive order and regulations establishing an amended "two-tier" system of price controls effective in February 1976 (41 F.R. 4931) adjusted in March and July 1976, and thereafter in minor respects not significant in the context of this case.

It is uncontested that this "rollback" of permissible prices of "upper-tier" domestic crude oil obtainable in the open domestic market resulted in greatly reduced controlled maximum prices for "upper-tier" oil obtainable by plaintiffs and others because of governmental action pursuant to §757.

This "rollback" of prices of "upper-tier" domestic crude oil is the precise target of plaintiffs' contentions of unconstitutionality under both the Ninth Amendment and later under the Fifth Amendment.

As a factual basis for their constitutional claims and standing to assert them, plaintiffs filed affidavits in support of their motion for summary judgment, stating in part that in reliance on the "two-tier" pricing system existing in law prior to December 15, 1975, each plaintiff invested many millions of

dollars in increased drilling and development activities between August 1973 and December 1975 in an effort to increase their crude oil production of upper-tier crude oil (R. 130, 132). No counter affidavits were filed. On these subjects, as distinguished from other subjects, the affidavits in support of the motion of plaintiffs for summary judgment were proper and will be deemed sufficient to establish the facts stated therein for the purposes of that motion.

Neither plaintiff filed any affidavit in support of a motion for summary judgment that the maximum prices of "upper-tier" oil resulted in "serious hardship" as defined by FEA as a basis for administrative relief. In his affidavit, plaintiff Manhart states that he is not in "serious hardship" as defined by FEA. Neither plaintiff has sought any administrative relief in the form of either an exception or exemption for hardship or other reason under 10 C.F.R., Subpart D, §205.50, *et seq.*, and Subpart E, §205.70, *et seq.* These regulations provide administrative remedies for affected parties in the form of exceptions or exemptions.

Decision On Ninth Amendment Question

The Ninth Amendment to the Constitution of the United States is as follows:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Plaintiffs seek to secure from this Court a ruling, admittedly without precedent, that there exists a hitherto judicially unrecognized and undefined individual constitutional right under the Ninth Amendment "to trust the federal government and to rely on the integrity of its pronouncements." We find no

basis in constitutional history, judicial interpretation, political history, legal scholarship, or persuasive argument to conclude that such a right exists under the Ninth Amendment, or any other provision of the Constitution of the United States. And, if such a constitutional right did exist, it is doubtful that it would be, or could be, applied to render unlawful the "rollback" of "upper-tier" oil prices under §757, thereby denying to Congress the power to amend the Allocation Act of 1973, by adding §757.

Admitting that there is no controlling judicial authority in point to support the existence of the claimed Ninth Amendment right, plaintiffs assert that this is a question of first impression. In support of its argument, plaintiffs' counsel cites an exceedingly long, indiscriminate list of federal and state judicial decisions, legal articles, political essays, including some from *The Federalist Papers*, and other sources mentioned above. At oral argument, on request, counsel for plaintiffs selected as the three federal² authorities on which plaintiffs would rely, if limited to three citations, the following: *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1976); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); and *The Federalist Papers*, Nos. 11, 44, 45, 46, 50, 57, 62, 78, 84, 85.

We have concluded that under the most innovative, creative, and liberal view of the Ninth Amendment concerning unenumerated rights retained by the people, the constitutional right defined by the plaintiffs does not exist. None of the judicial opinions relied on by plaintiffs suggest that such a right exists or ought to exist. By its definition, the right claimed in this case is based on subjective beliefs of the plaintiffs concerning what the "federal government" has pronounced as "policy."

²Plaintiffs chose to add the concurring opinion in a state decision holding unconstitutional a local ordinance forbidding presence at a cockfight, deemed interesting but unpersuasive in this action. *State v. Abellano* (1968) 441 P.2d 333, 1.c. 335. The concurring opinion was unnecessary to the decision, which was based on lack of due process.

In our constitutional tripartite system of government, featuring checks and balances between and within the three branches, it is rarely the case, if ever the case, that all branches of the government join in a unanimous, clear statement of policy or meaning of a law that all people unanimously understand and interpret exactly the same way. Frequently, the executive, legislative, and judicial branches disagree about laws and policies. One branch of government acting within its constitutional authority sometimes nullifies or restricts action of another branch.

Popular elections are regularly scheduled by the Constitution and laws of the nation and states as an opportunity to change laws, policies, and the principal national officers of the legislative and executive branches of the federal government.³ If the legislative branch declares a clear policy and enacts a law to implement the policy, it may later change that law and policy if it acts within accepted constitutional limitations. The judicial branch may declare actions of the legislative and executive branches unconstitutional, or interpret such actions contrary to contentions of the officers of the executive or legislative branches.

The right claimed by plaintiffs is not consistent with these accepted constitutional principles. Even subjectively, the plaintiffs had no constitutional or other right to assume that the federal government or any branch thereof represented prior to December 1975, or made a policy that the permissible prices of "upper-tier" oil would never be changed or reduced.

Nothing in the opinion in *Griswold v. Connecticut, supra*, supports the existence of the Ninth Amendment right claimed by

³In *Federalist Paper No. 44*, Madison emphasized this remedy as a last resort when the Congress misconstrues the Constitution and exercises unwarranted powers.

plaintiffs. In reaching this conclusion, we acknowledge that the strength and vitality of the Constitution depend on the fact that its principles are adaptable to changing events. And assuming, without declaring, that the concurring opinion of Mr. Justice Goldberg accurately construes the breadth of the Ninth Amendment, nothing in that opinion supports plaintiffs' Ninth Amendment contentions. Even the scholars who approve of, or search for new standards to discover and judicially declare Ninth Amendment rights previously undeclared by any court, fail to support plaintiffs' Ninth Amendment contention. For example, see Towe, *Natural Law And The Ninth Amendment*, 2 Pepperdine Law Review 270, a comprehensive liberal and scholarly exposition, advocating an "ideal scale of values" to declare unenumerated natural rights recognized by the Ninth Amendment; Rhoades & Patula, *The Ninth Amendment: A Survey Of The Theory And Practice In The Federal Courts Since Griswold v. Connecticut*, 50 Denver Law Journal 153, competently reviewing the federal cases since the *Griswold* case; Paust, *Human Rights And The Ninth Amendment: A New Form Of Guarantee*, 60 Cornell Law Review 231, an excellent review of the general principles relied on by plaintiffs and containing a "sketch of discoverable rights."

The law review articles make it clear that a majority of the Supreme Court of the United States has never declared and defined an unenumerated Ninth Amendment constitutional right retained by the people. It is not implausible to argue that the original purposes of the Ninth Amendment have been served by the expanding, liberal judicial interpretations of the rights enumerated in the first eight amendments constituting the principal parts of the Bill of Rights of the Constitution, and of their penumbras, accompanied by their incorporation in the Fourteenth Amendment applicable to states. This is the essence of the reasoning of Mr. Justice Douglas in *Griswold v. Connecticut, supra*, and there is reason to believe that if Mr.

Justice Goldberg had accepted the incorporation of the first eight amendments to the Constitution in the Fourteenth Amendment, his special concurring opinion relying on the Ninth Amendment would not have been necessary or desirable.

Plaintiffs' reliance on *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 478, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), clearly an application of the First Amendment only, and not in point, is cited by plaintiffs for the proposition that the "right to trust the federal government and rely on its pronouncements is but the mirror image of the First Amendment rights to speech, petition, and knowledge." In support of this proposition, plaintiffs cite a portion of *Keker v. Procunier* (E.D.Cal. 1975) 398 F.Supp. 756, l.c. 765, dealing with the Sixth Amendment only. Further, a careful reading of each of *The Federalist Papers*, Nos. 11, 44, 45, 46, 50, 57, 62, 78, 84, and 85, relied on primarily by plaintiffs, fails to reveal any language, express or implied, supporting the existence of the claimed Ninth Amendment right.

Analysis and discussion of the additional host of authorities cited by plaintiffs would be unrewarding. Enough has been written to support our conclusion that the plaintiffs have failed to demonstrate the existence of the asserted Ninth Amendment constitutional right.

A necessary and integral part of plaintiffs' contention that a violation of its claimed Ninth Amendment right is the existence of a reasonable trust or belief by plaintiffs before December 15, 1975, that the federal government would never reduce the permissible prices on "upper-tier" oil; and that neither the Allocation Act of 1973, nor the original regulations thereunder creating the "two-tier" system would ever be amended for that purpose. No such trust or belief was warranted in fact or law. If such trust or belief in fact existed in the minds of plaintiff

Manhart and the officers of plaintiff MAPCO, it was unreasonable and erroneous so to trust or believe.

In their briefs, plaintiffs do not define precisely the meaning of the word "trust" as used in their description of the claimed Ninth Amendment right. In the sense that the word "trust" is used by plaintiffs, it has many meanings, ranging from assured reliance or confident expectation, to hope. *Webster's Third New International Dictionary*, G. & C. Merriam Company, 1971, p. 2456; *The Random House Dictionary of the English Language*, Random House, 1967, p. 1521; *The American Heritage Dictionary*, American Heritage Publishing Co., Inc., 1969, p. 1378; Volume I, *The Compact Edition of the Oxford English Dictionary*, Oxford University Press, 1971, p. 3423; *Black's Law Dictionary*, Revised Fourth Edition, West Publishing Company, 1968, p. 1680; *Ballentine's Law Dictionary*, Third Edition, The Lawyers Co-Operative Publishing Company, 1969, p. 1302. All of these definitions describe a subjective condition of the individual mind. We recognize that: "A word is not a crystal transparent and unchanged; it is a skin of living thought and may vary greatly in color and content according to the circumstances and time in which it is used," as stated in *Towne v. Eisner*, 245 U.S. 418, l.c. 425, 38 S.Ct. 158, l.c. 159, 62 L.Ed. 372, l.c. 376. Giving to the word "trust" the meanings most favorable to plaintiffs, that of assured reliance or confident expectation, it still describes a subjective condition of individual minds that simultaneously may be absent in some minds, and present in other minds in varying degrees, forms, and substances. This concept of "trust" is not suitable for defining a constitutional right enjoyed by all citizens or persons, however well it may serve in a motto. The same things can be said of the word "rely" as used by plaintiffs.

Further, it is clear that the original regulations containing the "two-tier" system did in fact control prices of all crude oil, including "upper-tier" oil. *Consumers Union of U.S., Inc. v.*

Sawhill (Em.App.) 525 F.2d 1068, l.c. 1078. By their very nature, laws and regulations of the federal government are subject to change by lawful means. No law or regulation is immune to change by lawful means and no person can reasonably assume the contrary. And it is clear that Congress, in passing the Allocation Act in 1973, expressly contemplated that those regulations might be required to be modified. *Consumers Union of U.S., Inc. v. Sawhill, supra.* l.c. 1078.

In analogous circumstances in *People of the State of California v. Simon* (Em.App. 1974) 504 F.2d 430, l.c. 437, this Court ruled as follows:

"Had there been any induced assumption that the exemption would not be removed as a result of the pending rule making proceeding, there still could have been no assurance that by new rule making procedures otherwise initiated, whether retroactive or not, most if not all of the injury the appellees had apprehended would not have occurred anyway. On no theory did appellees have a vested right to continuation of the preferential treatment."

So we conclude that plaintiff had no right under the Ninth Amendment to trust, believe, or rely on the expectation that the maximum prices of upper-tier oil would never be regulated or reduced by the federal government.

THE FIRST FIFTH AMENDMENT QUESTION

Plaintiffs' Argument

In their second point, plaintiffs argue that §757 is unconstitutional on its face because it fails to provide a non-confiscatory standard for price regulation. In this point plaintiffs contend that the current pricing system under the Allocation Act, and §757 added by the Energy Policy Act, results in the imposition on the crude oil industry of a scheme of comprehensive market regulation of a *permanent* character, but fails to prescribe a mandatory standard for the fixing of "just and reasonable" crude oil prices; and that the action mandated by §757 contains no mandatory standard for just and reasonable prices.

The limitation of the plaintiffs' contention in this respect to facial unconstitutionality avoids possible questions related to failure to exhaust administrative remedies and unconstitutional application to plaintiffs alone. 3 Davis, *Administrative Law Treatise*, Chapter 20, §20.04 (West Publishing Co. 1958) and pocket part.

If the facial constitutionality of §757 and regulations issued pursuant thereto were conceded by plaintiffs, then they would be remitted in the first instance to seeking administrative relief from the regulations. 10 C.F.R. Subparts D & E, §205.50 and §205.70. *Davis, op.ct.*

Plaintiffs assert that, on this point, this is a "case of first impression," distinguishing *Griffin v. United States* (Em. App. 1976) 537 F.2d 1130, as involving old oil and *Condor Operating Co. v. Sawhill* (Em.App. 1975) 514 F.2d 351, as involving only the purchaser-supplier freeze rule, and *Consumers Union v. Sawhill* (Em.App. 1975) 525 F.2d 1068, as upholding as a

temporary measure the upper-tier of the two-tier system under the original Allocation Act of 1973 without the amendments of the Energy Policy Act. Noting that much of the jurisprudence in "permanent" market price control concerns public utilities, the plaintiffs rely primarily upon the *Permian Basin Area Rate Cases*, 390 U.S. 747, 88 S.Ct. 1344, 20 L.Ed.2d 312, *reh. den.* 392 U.S. 917, 88 S.Ct. 2050, 20 L.Ed.2d 1379, involving the Natural Gas Act, 15 U.S.C. §717 (1968).

In this connection, as stated above, plaintiffs argue that the Allocation Act as amended by §757 establishes a "permanent" scheme of comprehensive market regulation without a required non-confiscatory standard of price control. The fact of permanence is said to be established by the affidavits of Robert E. Thomas, Chief Executive Officer of Mapco, and plaintiff T. A. Manhart, the admissibility and relevance of which is challenged by defendants.

Plaintiffs argue that §757 of the Allocation Act compels the crude oil producer to serve the public and deprives him of the right to withdraw from the market to avoid regulation, in contrast to the regulations sustained in *Bowles v. Willingham*, 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892 (1944).

The First Fifth Amendment Question Defendants' Argument

Defendants contend that the *permanence* of the current system on which plaintiffs' arguments are based is conclusively absent, citing the direction to the President "to exercise specific temporary authority..." (15 U.S.C. §751(b)), and inviting attention to the provision that mandatory crude oil price controls imposed by the Energy Policy Act amendments expire 40 months after enactment of that Act, and that the authority for discretionary controls expires in September 1981. 15 U.S.C. §760g (Defendants' Br. 17-18).

Second, defendants argue that nothing in the Allocation Act forbids upper-tier crude oil producers from leaving the market, and that the challenged regulatory system applies to an upper-tier producer only if he elects to market crude oil. From these premises defendants argue that the Fifth Amendment does not forbid necessary temporary price and market control decisions, citing *Condor Operating Co. v. Sawhill* (Em.App. 1975) 514 F.2d 351, 361; *Cities Service Gas Co. v. FEA* (Em.App. 1975) 529 F.2d 1016, *cert. denied*, 426 U.S. 947, 96 S.Ct. 3166, 49 L.Ed.2d 1184.

Third, defendants assert that the plaintiffs' analogy of the current system to the requirements of the Natural Gas Act has already been rejected by the Temporary Emergency Court of Appeals in *Consumers Union v. Sawhill* (Em.App. 1975) 525 F.2d 1068, l.c. 1080.

Fourth, the defendants contend that the Allocation Act does in fact contain crude oil pricing standards which are non-confiscatory under the Fifth Amendment, citing the legislative history of the Act, Section 4(b) (1) of the Allocation Act and the interpretation thereof in *Consumers Union v. Sawhill* (Em.App. 1975) 525 F.2d 1068, l.c. 1074.

Finally, defendants argue that there has been no factual showing that either the initial composite price ceiling of \$7.66, nor the later composite ceiling of \$7.56 is confiscatory, or has caused financial difficulty to either plaintiff, stating that plaintiffs' real complaint is that they have been temporarily denied the continued opportunity to receive the higher crude oil prices set by the international OPEC cartel. Defendants argue that the contention that this is a denial of a Fifth Amendment right was rejected in *Griffin v. United States* (Em.App. 1976) 537 F.2d 1130, l.c. 1139-1140 (Defendants' Br. 21-24); and that plaintiffs are free to escape the consequences of the Energy Act by electing not to sell upper-tier crude oil.

The First Fifth Amendment Question
Plaintiffs' Reply Argument

Plaintiffs reply that freedom to elect not to sell upper-tier oil is an erroneous description of the supplier-purchaser conditions, arguing that, with certain exceptions in which a supplier-purchaser relationship may be terminated, these conditions do not include a unilateral decision by a producer to cease production or to produce crude oil but not sell it. Plaintiffs contend that producers are denied exit from the market by contractual agreements "universally present in the oil and gas industry" requiring production to continue.

Decision On First Fifth Amendment Question

Plaintiffs' first Fifth Amendment contention must be denied because it is based on three incorrect premises described below.

First, §757 is a part of the Allocation Act establishing not comprehensive, pervasive, all inclusive regulation of an industry, but "temporary regulation of some aspects of an industry, most particularly distribution." *Consumers Union of U.S., Inc. v. Sawhill* (Em.App. 1975) 525 F.2d 1068, l.c. 1080. The soundness of this quoted conclusion is apparent from the unequivocal provisions of the Allocation Act which became effective during an energy crisis. As presently amended, the Allocation Act grants authority that expires at midnight September 30, 1981. 15 U.S.C. §760g. While circumstances may result in a future extension of the time the authority continues, we do not find it necessary or desirable to determine the legality of such possible extension of authority. The self serving, conclusionary affidavits submitted by plaintiffs, and objected to by defendants, are inadmissible and ineffective to establish "permanency." Rule 56(e), F.R.Civ.P.; *Automatic Radio Research, Inc. v. Hazeline Research, Inc.*, 339

U.S. 827, l.c. 831, 70 S.Ct. 894, l.c. 896, 94 L.Ed. 1312, l.c. 1317 (1950); 6 Moore's *Federal Practice*, §56.22[1]; 10 Wright and Miller, *Federal Practice and Procedure*, §2738. While admissible opinion evidence in an affidavit in support of a motion for summary judgment may be considered in exceptional circumstances, inadmissible opinion evidence, irrelevant evidence, and conclusions in an affidavit are not proper and will not be considered. 6 Moore's *Federal Practice*, §2738, *supra*. And because, even if admissible, opinion evidence must ordinarily be evaluated by the finder of the facts, an affidavit containing admissible opinion evidence in support of a motion for summary judgment is not conclusive. *Sartor v. Arkansas National Gas Corporation*, 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967(1944). The affidavits relied on by plaintiffs are not admissible to contradict the clear statutory provisions, and, if admissible, are not persuasive or conclusive.

So, under the current established factual and legal circumstances, cases involving the Natural Gas Act, such as the *Permian Basin Area Rate Cases*, *supra*, are not applicable as determined in *Consumers Union of U.S., Inc. v. Sawhill* (Em.App. 1975), *supra*, 525 F.2d 1068, l.c. 1080. In this connection, we note that no law made by humans is "permanent." At the most, the duration is indefinite and subject to change.

Second, plaintiffs erroneously contend that the Allocation Act, and §757 added by the Energy Policy Act, deprive the plaintiffs of the right to withdraw from the market. No authority is cited for this contention. Only the effect of unidentified private contractual agreements are mentioned. These agreements, if any, made by plaintiffs were made voluntarily at the risk of the parties and cannot be the basis of a finding of facial unconstitutionality of §757.

Third, plaintiffs' remaining contentions are untenable under *Bowles v. Willingham*, 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892 (1944), and *Condor Operating Company v. Sawhill* (Em.App. 1975), *supra*, 525 F.2d 362, l.c. 359-362. As stated in *Bowles v. Willingham*, *supra*, "[o]f course, price control, the same as other forms of regulation, may reduce the value of the property regulated. But, as we have pointed out in the *Hope Natural Gas Co.* case...that does not mean that the regulation is unconstitutional." Further, there has been no unconstitutional taking of plaintiffs' property for public use under the two-tier price controls. *Griffin v. United States* (Em.App. 1976) 537 F.2d 1130, l.c. 1139-1140; Cf. *Bowles v. Willingham*, 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892 (1944).

The first Fifth Amendment question is, therefore, resolved in favor of the defendants.

THE SECOND FIFTH AMENDMENT QUESTION

Plaintiffs' Argument

In their second Fifth Amendment contention, plaintiffs contend that the mandate of §757 violates the Fifth Amendment because it does not have a real and substantial relation to the legislative object, which is the control of inflation. Plaintiffs rely upon an affidavit of David A. Huettner, Ph.D., an economist, Director of Energy Programs, Center for Economic and Management Research, University of Oklahoma. Dr. Huettner's affidavit (Exhibit B, R. 162-177) consists of an essay containing speculative, inadmissible conclusions and opinions, including the primary opinion that §757 will have an "extremely small and short lived deflationary impact on oil product prices..." (R. 170). The dominant theme of the opinion is that §757 will reduce

oil stock dividend income. In support of this second Fifth Amendment contention, plaintiffs cite only *Nebbia v. New York*, 291 U.S. 502, l.c. 525, 54 S.Ct. 505, l.c. 511, 78 L.Ed. 940, l.c. 949, 950 (1934).

The Second Fifth Amendment Question Defendants' Argument

Defendants state that, in the district court, plaintiffs conceded that the Congressional decision temporarily to control the price of domestic crude oil for the protection of the economy and security of the United States was a proper legislative purpose under the Fifth Amendment test of the *Nebbia* case (Defendants' Br. 24-25, fn.1).

Defendants argue that the affidavit of Dr. Huettner, who disagrees with Congressional policy, is speculative, immaterial, and inadmissible, and was subject to the defendants' motion to strike.

Defendants cite the contrary legislative history of the challenged legislation, consisting of the report of the House Committee on Interstate and Foreign Commerce (Defendants' Br. 27-28); FEA production estimates; a series of letters exchanged between Senator Henry M. Jackson and Frank Zarb, Administrator of the FEA, published in the Congressional Record; Presidential action on supplemental import fees imposed by President Ford in 1975 (Defendants' Br. 29-30), and the description of the composite price provisions in the Energy Policy Act by Senator Cannon (Defendants' Br. 30-31). Defendants state that those who disagree with the economic policy chosen by Congress in the Allocation Act have a political remedy in the right to vote.

The Second Fifth Amendment Question
Plaintiffs' Reply Argument

In their reply argument on the second Fifth Amendment issue, plaintiffs briefly reiterate the argument in their original brief and cite no additional authority.

Decision On The Second Fifth Amendment Question

The affidavit of Dr. Huettner cannot be considered to establish plaintiffs' factual contention that §757 has no real and substantial relationship to the legislative object to control inflation in petroleum product prices because it contains conclusionary, speculative, inadmissible evidence, which is also irrelevant. See authorities cited above concerning affidavits containing opinion evidence in the decision on the first Fifth Amendment question. Further, it is not relevant that in Dr. Huettner's opinion Congress was wrong in its choice of methods. And finally, it is noted that Dr. Huettner's opinion concedes that some deflationary impact will result from §757, and to this extent fails to support plaintiffs' contention.

The *Nebbia* case, *supra*, involving the Fourteenth Amendment supports the defendants. It holds, in part: "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary or discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*." 291 U.S. 1.c. 537, 54 S.Ct. 1.c. 516, 78 L.Ed. 1.c. 957.

It is not necessary to rely on any rebuttable presumption of validity of legislation to support findings of fact that §757 has a reasonable relation to a proper legislative purpose, and is neither arbitrary or discriminatory. Cf. 16 Am.Jur. 2d §§137, 138, 139,

and cases therein cited on the rebuttable presumption of validity. The finding of fact that §757 has a reasonable relation to the legislative purposes is amply supported by the texts of the Allocation Act and the Energy Policy Act, and legislative histories of these Acts.

The original full text of the Allocation Act is found in 1 U.S. *Code Congressional and Administrative News*, 93rd Congress, First Session, at pages 693 to 702. The supporting legislative history of the Allocation Act appears in 2 U.S. *Code Congressional and Administrative News*, 93rd Congress, First Session, at pages 2582 to 2712. The original full text of the Energy Policy Act is found in 1 U.S. *Code Congressional and Administrative News*, 94th Congress, First Session, at pages 871 to 969. The supporting legislative history of the Energy Policy Act appears in 2 U.S. *Code Congressional and Administrative News*, 94th Congress, First Session, at pages 1762 to 2059.

CONCLUSIONS

For the foregoing reasons, plaintiffs' motion for summary judgment is denied in respect to each ground on which §757 is challenged as unconstitutional. Defendants' motion for summary judgment is granted on each of these grounds. It is therefore

ORDERED that judgment be, and it is hereby, entered for defendants on the constitutional issues.

This action is hereby remanded to the United States District Court for the Northern District of Oklahoma for further proceedings consistent with this opinion.

Supreme Court, U.S.
FILED

No. 77-1458

JUN 5 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1977

MAPCO INC. AND THOMAS A. MANHART, PETITIONERS

v.

JIMMY CARTER, PRESIDENT OF THE
UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. A-5 to A-37) is not yet reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals (Pet. App. A-4) was entered on March 14, 1978. The petition for a writ of certiorari was filed

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on April 12, 1978. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended, 85 Stat. 743, 750, 87 Stat. 27, 12 U.S.C. 1904 note, and 28 U.S.C. 1254(1).¹

QUESTIONS PRESENTED

1. Whether the temporary domestic crude oil price ceilings imposed by 15 U.S.C. 757 violate the Fifth Amendment.
2. Whether the implementation of those price ceilings, following a period during which certain crude oil prices had been permitted to rise to market levels, violated petitioners' asserted Ninth Amendment right to trust the government.

STATEMENT

In response to a nationwide petroleum shortage, Congress enacted the Emergency Petroleum Allocation Act of 1973, 87 Stat. 627, 15 U.S.C. 751 *et seq.* Under the authority of that Act, the Federal Energy Office (later the Federal Energy Administration and now part of the Department of Energy) promulgated regulations governing the pricing of domestically produced petroleum. The regulations, which were intended to minimize the inflationary effect of rising world oil prices while at the same time providing incentives for increased domestic production, estab-

¹ See also Section 5(a) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 633, as amended, 15 U.S.C. 754(a), incorporating Section 211(g) of the Economic Stabilization Act by reference.

lished a "two-tier" pricing system for domestic crude oil. The two-tier system provided a price ceiling on "old oil" (oil from properties producing at or less than their 1972 levels) but no such ceiling for "new oil" (oil from properties producing more than their 1972 levels). Under the regulations, the new oil prices were permitted to rise to the world market price level (Pet. App. A-12 to A-14).

With the enactment of the Energy Policy and Conservation Act of 1975, 89 Stat. 871, 941-946, Congress altered this scheme by adding Section 8, 15 U.S.C. 757, to the Allocation Act. Section 757 amended the two-tier system so that the price of new oil would be controlled at a level somewhat below the market price. The two-tier system was retained, but the price of new oil was controlled along with the price of old oil so as to produce a controlled average price per barrel for domestic crude oil (Pet. App. A-18 to A-22).² That average price—and thus the ceiling price of new oil—is subject to upward adjustments in response to inflation and the need to provide incentives for increased production. 15 U.S.C. 757(d). The Act further provides that the mandatory domestic crude oil price controls imposed by Section 757 will expire 40 months

² The average price per barrel was calculated from a baseline price of \$5.25 per barrel for old oil (the current ceiling price) and \$11.28 per barrel for new oil (the prevailing world market price in January 1975). S. Conf. Rep. No. 94-516, 94th Cong., 1st Sess. 190 (1975). The January 1975 figure was selected in order to counter the effects of the newly imposed oil import fees and the most recent OPEC price increases.

after enactment, i.e., early 1979, and that the authority to impose discretionary controls will expire in September 1981. 15 U.S.C. 760g.

Petitioners, who are engaged in the production and sale of petroleum products, brought this action in the United States District Court for the Northern District of Oklahoma, seeking to enjoin the implementation of the temporary crude oil price ceilings prescribed by 15 U.S.C. 757(a). Petitioners alleged that the price ceiling on new oil confiscated their property without just compensation, in violation of the Fifth Amendment. They also alleged that by imposing a price ceiling on new oil after having previously permitted the price of new oil to rise to the market price in order to encourage domestic production, Congress had violated their Ninth Amendment right to trust the federal government and to rely on its pronouncements (Pet. App. A-6 to A-9).

The district court certified the constitutional questions to the Temporary Emergency Court of Appeals (Pet. App. A-1 to A-3, A-10). That court rejected both constitutional challenges. It held the Fifth Amendment claim unfounded, both because the regulatory scheme set out in Section 757 is limited and temporary and because, under established constitutional doctrine, imposition of a price ceiling does not constitute a taking merely because it renders a potential seller's property less valuable (Pet. App. A-32 to A-34). The court dismissed the Ninth Amendment argument on the ground, *inter alia*, that there was

no representation by the government, implicitly or explicitly, that the price of new oil would be permitted to remain at the world market level indefinitely (Pet. App. A-28).

ARGUMENT

1. Petitioners contend (Pet. 14-21) that Section 757 violates the Fifth Amendment because it authorizes a permanent taking of their property without just compensation.

As this Court has repeatedly held, the imposition of maximum prices is not unconstitutional merely because the value of regulated property is reduced as a consequence of the regulation. *Permian Basin Area Rate Cases*, 390 U.S. 747, 769; *Bowles v. Willingham*, 321 U.S. 503, 517; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 601; *Nebbia v. New York*, 291 U.S. 502. The price ceiling imposed on new oil by Section 757 is part of an administrative scheme that calls for "equitable distribution of crude oil * * * at equitable prices" (15 U.S.C. 753(b)(1)(F)), and the "preservation of an economically sound and competitive petroleum industry" (15 U.S.C. 753(b)(1)(D)). The Conference Report on the Allocation Act, H.R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess. 26 (1973), noted that the "equitable price" standard imposed by Section 753(b)(1)(F) contemplates price levels that "will permit adequate compensation to assure that private property is not implicitly confiscated by the government." See *Consumers Union of the United States, Inc. v. Sawhill*, 525 F.2d 1068,

1074 (T.E.C.A.) (*en banc*). Since the statute provides for non-confiscatory pricing, the price restraint is within the "broad zone of reasonableness," *Permian Basin Area Rate Cases*, *supra*, 390 U.S. at 770, and is not facially unconstitutional.

The price ceiling imposed by Section 757 is further justified because it was implemented as a temporary measure in response to a national emergency. Such temporary legislation designed "to tide over a passing trouble" may be justified even if the same legislation could not be upheld if it were intended as a permanent regulatory measure. *Block v. Hirsh*, 256 U.S. 135, 157; *Cities Service Co. v. Federal Energy Administration*, 529 F.2d 1016, 1028 (T.E.C.A.), certiorari denied, 426 U.S. 947; *Consumers Union of the United States, Inc. v. Sawhill*, *supra*, 525 F.2d at 1080; *Condor Operating Co. v. Sawhill*, 514 F.2d 351, 361-362 (T.E.C.A.), certiorari denied, 421 U.S. 976.

Petitioners further suggest (Pet. 23-24) that, by virtue of the statute and its implementing regulations, they are locked into their prior relationships with their customers, and that this enforced "lock-in" violates their Fifth Amendment rights. The regulation of which petitioners complain, 10 C.F.R. 211.63, requires that all supplier-purchaser relationships in effect on January 1, 1976; shall remain in effect for the duration of the regulatory program, except under limited circumstances. But, as the court of appeals held (Pet. App. A-33), neither the statute nor the regulation deprives petitioners of the right to withdraw from the market. Petitioners are not required

to produce or market crude oil. The statute and regulations merely require that if petitioners elect to produce and market crude oil, they must do so in the manner spelled out in the regulations, which have been designed to preserve and stabilize the nation's crude oil distribution system at a time when there is maximum potential for disorder. *Condor Operating Co. v. Sawhill, supra; Block v. Hirsh, supra.*

2. In support of their novel Ninth Amendment argument, petitioners claim to have hazarded their capital on crude oil exploration and development activities on the expectation, induced by the government, that they would continue to receive world market prices for their "upper-tier" oil.³ They argue (Pet. 24-34) that, because of their expectations, the government should be estopped under the Ninth Amendment from putting a temporary lid on the ceiling price for this oil.

Whatever the legal status of a doctrine that would disable Congress from amending or repealing laws once private persons have relied on the first enactment, there is no foundation for its application here. As the court of appeals held, the government never represented that the price of upper-tier crude oil would remain indefinitely at the world market level set by the OPEC cartel. The fact that the government gave favored treatment to upper-tier oil in order to provide additional economic incentives for

³ "Upper-tier" oil includes new oil and other classes of crude oil that are permitted, under the regulations, to be sold at the higher price level in the two-tier price system.

production does not mean that the government in any way warranted that such favored treatment would always continue, and at OPEC prices. Upper-tier crude oil prices were controlled prior to the passage of Section 757 but were simply permitted to rise during that period to world market levels. *Consumers Union of the United States v. Sawhill, supra, 525 F.2d at 1077-1079.* Moreover, the composite price program implemented under Section 757 retains the two-tier pricing system and continues to give favored treatment to upper-tier oil. *Griffin v. United States, 537 F.2d 1130, 1139 n.26 (T.E.C.A.).* Thus, even if the Ninth Amendment or some other constitutional principle guarantees petitioners a "right to trust the government," that trust has not been breached by the implementation of the temporary domestic crude oil price controls prescribed by Section 757.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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